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INTRODUCTION

It is now a few years since Switzerland enacted the Federal Law on Mutual Assistance in Criminal Matters (IMAC),[1] in force as of January 1, 1983. The present time offers a good opportunity to survey the current status of the Swiss substantive and procedural law of extradition. Many questions have arisen due to the simultaneous existence of old bilateral, and more recent multilateral, agreements that are binding upon countries that have also enacted internal (national) laws, including the following: 1) To what extent are the individual countries bound by these agreements? 2) May these countries act in ways beyond the terms of the agreements in order to combat international crime? and 3) How is the individual protected under these agreements?[2] This article

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1. Loi Federale sur L'Entraide Internationale en Matiere Penal, 1982 Sammlung der Eidgenossischen Gesetze (A.S.) II 8467, Recueil Systematique des lois (RS) 351.1 (Switz.) [hereinafter IMAC] Translated by Dr. L. Frei and H.P. Wyssmann, officers of the Federal Office of Police, Bern. The translation is used throughout this article.

The IMAC was enacted following similar legislation in neighboring countries, such as Germany and Austria. Deutsches Rechtschilfe Gesetz, 1982 Bundesgesetzblatt (BGBI) 2071 (W. Ger.); Bundesgesetz uber Auslieferung und Rechtshilfe in Strafsachen, 1979 Bundesgesetzblatt (BGBI) 529 (Aus.).

2. For a brief discussion of bilateral agreements and municipal law, *see infra* PART ONE § I. The shift in emphasis from the protection of individual rights to the granting of assistance for the sake of international cooperation will be evident from the discussion below.

will show that Switzerland has attempted to provide the necessary assistance for combatting international crime, while strictly adhering to the principle of individual rights in a most liberal interpretation of Swiss political and social life. Part One of this article will outline the basic prerequisites for the extradition of suspects or convicts, and discuss the potential conflict between international and national law. Part Two will deal with the limits on extradition, distinguishing between mere restrictions and absolute exclusions. Part Three will focus on the political offense as interpreted by Swiss jurisprudence and its impact upon international humanitarian concepts in contrast to the more conservative approach for protecting society.

PART ONE — THE BASIC PREREQUISITES

I. JUDICIAL ASSISTANCE AND PHYSICAL SURRENDER

The IMAC covers both judicial assistance in criminal matters and extradition. Included under the concept of assistance are the rules of evidence, the transfer of proceedings and the execution of foreign judgments. Only the problems of extradition will be dealt with in this paper. The rules of evidence shall be referred to only if they help in clarifying extradition matters by analogy or if they are applicable to one of the two subjects, by *argumenti ex contrario*. Extradition is granted according to: 1) Multilateral conventions (for example, the European Convention on Extradition (ECE); 2) Bilateral treaties; 3) Declarations of reciprocity; and 4) Municipal law existing in practically all countries (in Switzerland formerly the Extradition Law of 1892, and since 1983 the new IMAC).

A. Request

Because extradition goes one step further than mere judicial assistance—it physically surrenders a person for trial elsewhere or, if already convicted, for the execution of a sentence—it necessitates tougher and more rigid prerequisites which, at least by democratic concepts, tend to protect the suspect or the convict.[3] The procedure must

3. J.B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 363 (1891): "Extradition is an act of international judicial assistance providing, however, for the surrender of an individual prosecuted or sentenced from one sovereignty to another." *Id.* *See also Rapport Général pour le Xme Congrès International de Droit Pénal* (1969) *reprinted in*, H. Schultz, *Les Problèmes Actuels de l'Extradition, et de delit politique*, 45 REVUE INT'L DE DROIT PÉNAL 785, 788 (1974). [hereinafter *Problèmes de l'Extradition*]. Thus "basic prerequisites" must be examined ex officio, irrespective of formal objections raised by the suspect (or convict). *Id. Accord* 2 P. GUGGENHEIM,

exclude any potential arbitrariness, and, therefore, requires a formal request that presents a clear-cut case, showing both facts and law[4] as a

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VÖLKERRECHT (1948). The United States Supreme Court in Terlinden v. Ames, 184 U.S. 270 (1902) defined extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." *Id.* at 289.

Under international law there is really no substitute for extradition. Abducting a wanted suspect from the country of his abode to where the prosecuting authority wants him delivered might be justified under certain circumstances, but it is not a legal procedure. It would not fit any Swiss concept, nor would police expulsion or forced deportation.

Professor B.J. George, Jr. of the New York Law School in an address to the Boston Congress of the Association of Jurists Italy-United States-Switzerland in September 1987 entitled "Problems of International Extradition—USA and Italy," presented a legal concept for forced extradition under United States law. Professor George referred to such cases as Ker v. Illinois, 119 U.S. 436 (1886), United States v. Toscanino, 508 F.2d 896, 900 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

From a strictly legal point of view, the abduction of Nazi criminal Eichmann was just as questionable. In a resolution on June 23, 1960, U.N. Doc. 8/4349 (1960), the U.N. Security Council stated that such acts affect the sovereignty of a member nation and therefore are liable to cause international friction, and, if repeated, would tend to endanger peace and security. The case was not carried further because of the international consensus at the time. Switzerland, as a neutral country and not belonging to the U.N. took no position, but Swiss scholars defended the rule *"male captus, bene indicatus."* *See also* C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 133-34 (1974).

The Swiss Federal Supreme Court in *In re* Tezzler, Entscheidungen des Schueizerischen Bundesgerichts, Amtliche Sammlung (BG) 92 I 382 (1966), granted extradition despite the individual's having asylum status, but "no refoulement" to the country to which he fled. Deportation in lieu of extradition would probably be in conflict with Swiss public order.

4. For a discussion of the requirements for the formal document containing the request, see *infra* PART ONE § II, *D* and accompanying text.

Switzerland has decided by an Administrative Act of the Department of Justice, IX A 133, Feb. 14, 1983, and upon a decision by the Federal Supreme Court, in *In re* Bagci, BG 108 I b 301 (1982), that there can be a surrender to Italy without an actual request.

The Swiss Justice Department surrendered Turkish shipbuilder, Mehmet Cantas, to Italy without a formal request. Cantas was regarded by the Italian and Turkish authorities as a major figure in the international drug and arms trafficking scene between Europe and the Middle East. Cantas was arrested in Zurich, Switzerland upon an international warrant of arrest. The Swiss Department of Justice stated that Cantas was surrendered to Italy with his consent because he purportedly preferred to be surrendered to Italy because of the more severe treatment which might have awaited him in Turkey. *Id.*

Extradition without request has been made possible in Switzerland by the enactment of the IMAC, wherein article 1 provides for a formless surrender upon the consent of the suspect. IMAC, *supra* note 1, art. 1. The suspect, nonetheless, will enjoy all privileges inherent to extradition law, including "speciality" (See *infra*, PART ONE § III, *B*)—and according to the European Convention on Extradition, Dec. 13, 1957, art. 14,

basis for the petition of extradition. Most importantly, the legal basis concerning the elements of the act in question must exist in both the requesting country and the requested one.[5] The requesting country must also prove that it has the exclusive jurisdictional right to prosecute the offense alleged. The requesting country need not show a definite lack of jurisdiction by the requested country as this argument would be a valid objection to be raised by the requested country itself.[6]

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359 U.N.T.S. 274 [hereinafter ECE] and the IMAC, *supra* note 1, art. 39, he will not be prosecuted in the extraditing country for anything not specified in an international warrant of arrest. Most important, the suspect cannot be surrendered later to a third country without the explicit consent of the Swiss authorities; such consent being subject to review by the Federal Supreme Court upon the petition of the surrendered individual.

Cantas is also suspected of having collaborated with a certain Behir Celenk, who is said to be one of the organizers of the attempt on the life of Pope John Paul II in May, 1981. The perpetrator of the crime, Ali Agca, in his testimony, declared that Celenk had furnished the pistol and had promised to pay him a substantial amount for the killing. The crime of conspiracy (in Italian: *associazione per delinquere*) was not alleged in the warrant, conspiracy is not punishable in Switzerland. Accordingly, surrender on that count would have failed due to lack of "dual criminality." Celenk fled and was tried in absentia in Rome. The Bulgarian nationals, who were accused of being involved in the plot and who were tried in the same proceeding, were acquitted. Celenk, though, remains at large. It is not known how Celenk arrived in Bulgaria and managed to make his way to Turkey, despite the tight security measures taken by the Turkish authorities. Italy, however, has not requested the extradition of Celenk by Turkey, and even if he were found there the Turkish authorities would likely not extradite him because of his Turkish nationality.

A surrender without a formal request must be distinguished from an "informal surrender," which under the IMAC is based not only on a request, but also upon consent of the suspect (or the convict). This "informal surrender" takes place without a further hearing. IMAC *supra* note 1, art. 54. Even in that case, the individual is protected against re-extradition, and that may often be a motive to consent, fearing another request from a third country with a prospect for harsher treatment. The German Extradition Law, 1982 BGBl 2071, codified extradition by consent under the term "simplified extradition." *Id.* para 41. A similar provision exists in the extradition treaty between the United States and Italy. United States-Italy Extradition Treaty, art. XVII, No. 225, 1984 Gazetta Ufficiale della Repubblica Italiana (Gaz. Uff.) Oct. 20, 1984.

5. The principal of *nulla traditio sine lege* is commonly referred to as "dual criminality" or "double punishability".

6. A country's right to prosecute a crime would normally exclude extradition. The doctrine that asserting jurisdiction according to a country's own municipal laws might be in conflict with granting a request for extradition has been adhered to by many leading scholars when discussing the commitment to surrender a criminal to a foreign jurisdiction. *See* H. SCHULTZ, DAS SCHWEIZ AUSLIEFERUNGSRECHT 41 (1953); 2 D. DE VABRES, LES PRINCIPES MODERNES DE DROIT PÉNAL INTERNATIONAL 269 (1928); LISZT, 2 ZEITSCHNFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 66 (1886); 2 GUGGENHEIM, *supra* note 3, at 524 n.45; 4 M. TRAVERS, LE DROIT PÉNAL INTERNATIONAL 555, ¶ 2065 (1921).

Swiss practice generally follows the rule of non-extradition when asserting jurisdiction, *see* D. PONCET & P. NEYROUD, L'EXTRADITION ET L'ASILE POLITIQUE EN SUISSE 23 (1976), in which there is a reference made to the old extradition law RS 353.0 (abro-

B. *Dual Criminality*

The prerequisite of dual criminality is essential because no prosecution may be initiated if the offense is not punishable. The requesting

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gated). Message by the Federal Counsel, Bundesblatt (BBl) 1890 III 210. According to article 32 of the IMAC, Switzerland may extradite an individual to another State if that State has jurisdiction over the offense or if it accepts a Swiss request to assume jurisdiction, IMAC, *supra* note 1, art. 32, and article 36 of the IMAC allows Switzerland to extradite an individual for an offense which comes under Swiss jurisdiction if special circumstances exist, especially in a situation in which there is the possibility of social rehabilitation. *Id.* art. 36. This law leaves a tremendous degree of discretionary power to the Swiss authorities and, as a consolation to the individual suspect, to Swiss judicial authority. *See also* Swiss Reservations to the ECE, arts. 7-8, BBl 1967 319, indicating an assumption of jurisdiction vis-à-vis co-signatories of the ECE as a discretionary decision on the practicability of a country's own prosecution in leiu of extradition. In the United States-Italy Extradition Treaty, No. 225, 1984 Gaz. Uff. Oct. 20, 1984, there is a specific provision denying extradition if the requested State prefers to prosecute the suspect. *Id.* art. VII.

Even if Switzerland initiates the prosecution, it can extradite a suspect if the offense committed in Switzerland is of secondary importance; that is, if the important offense was committed abroad. *In re* Koenig, BG 105 I b 294 (1979). The Swiss Government also has the authority to initially prosecute in Switzerland for an act committed in Switzerland or an act committed abroad but having an effect in Switzerland, *In re* Tani, BG 101 I a 401 (1975), or if part of a crime is committed in Switzerland. *In re* Vervaldi, BG 103 I a 616 (1977). The Court has also denied extradition when, although the crime was committed abroad, there was a severe effect in Switzerland, and, therefore, jurisdiction was asserted. *In re* Buser, BG 81 IV 285 (1955).

The Court has also held that new facts may force review of an extradition case, but they need not be taken into consideration if the prosecution is initiated in Switzerland before the extradition. *In re* Palazzolo, BG 110 IV 118 (1984). If part of the crime is committed in Switzerland, the Court may deny extradition, *see In re* Calmasini, BG (unpubl.) (Mar. 14, 1984), but it may also surrender the suspect if the "resocialization" process is better served there. *See In re* Malafronte, BG (unpubl.) (Sept. 17, 1985) (jurisdiction under article 7 of the ECE and article 36 of the IMAC is Swiss, but extradition was granted because Italy is better equipped for the social rehabilitation of an Italian citizen).

In *In re* McCharra, BG 110 I b 280 (1984), the Court held that article 37 of the IMAC did not apply, when the treaty compelled extradition and no reason for asserting Swiss jurisdiction. Under a treaty supplement to the ECE with Germany, BBl 1970 II 241, RS 913.61, when there is a partial offense in Switzerland (and a partial offense in Germany), the consequential question of jurisdiction may be ignored if the suspect is already being prosecuted in Switzerland. *In re* Lindauer, BG (unpubl.) (Sept. 12, 1984) (Germany asked for and was granted extradition for the other offenses).

Another recent case concerned an individual residing in Switzerland, who refused to support a dependent residing in Austria. The Court held that Austria had jurisdiction in the matter because the creditor was domiciled there and because the offense (non-payment of support) was punishable in both countries. The Court granted extradition based on Austrian jurisdiction, and on the fact that the effect of the offense was in Austria. *In re* Hechenberger, BG (unpubl.) (Nov. 8, 1984).

With regard to other municipal laws, the Austrian extradition act explicitly denies

country has no right to prosecute an innocent individual, and the requested country has no right to surrender that individual unless the offense in the request is punishable.[7] In cases of doubt, the law of the requested state will always prevail because it is that state which decides on the requested surrender. Here, there is no question of guilt or innocence (a question of fact), but rather an argument that the facts asserted in the request—with or without prima facie evidence—constitute the elements of an offense (a question of law).[8] Nearly all treaties have adhered to this principle in the past, and the ECE has confirmed it unequivocally.[9]

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extradition if Austria asserts jurisdiction. BGBl 529, para. 16(1). Austria may grant a petition for extradition, however, if the requesting country can demonstrate primary jurisdiction. *Accord* Loi relatif á l'extradition des etrangers, arts. 5(3)-(4), 1927 J.O. No. 2068.

7. A lengthy discussion was held in 1969 at the Tenth Congress of Criminal Law in Rome on whether double punishability (or dual criminality) was derived from the principle of reciprocity or had its own *raison d'etre.* That discussion, however, was purely theoretical and served no practical purpose. That the accused person, after surrender, is found innocent in the requesting country, has no bearing on the question of dual criminality. *See* Report by Curt Markees to the Tenth International Congress on Penal Law, *reprinted in* 40 REVUE INTERNATIONALE DE DROIT PÉNAL 742, 748 (1968); Schultz, *Report General Provisoire sur la Question IV Pour le X Congres International de Droit Pénal,* 40 REVUE INTERNATIONALE DE DROIT PÉNAL 785, 801 (1968) [hereinafter *Schultz Report*]. The Congress did recommend certain modifications to the ECE.

8. *See* Schultz, *Principles of Traditional Extradition Law* in EUROPEAN COMMITTEE ON CRIME PROBLEMS: LEGAL ASPECTS OF EXTRADITION 12-13 (1970) [hereinafter *Traditional Extradition Law*].

9. Under article 2, paragraph 2 of the ECE an offense must be punishable in both countries. ECE, *supra* note 4, art. 2, para. 1. Historically, however, Scandinavian countries have not required dual criminality. *See* Norwegian Extradition Law of June 13, 1908, *as amended,* June 16, 1922, 24 Norsk Loftvidende 154/08 & 26/290/1; Swedish Extradition Law of June 4, 1913, 68 Svensk Forfattnings-Sammling, 124/30 (1913). *See also* Mettgenberg, *Reziprozitaet im Deutschen Auslieferungsrecht,* 25 AREHIV FÜR OFFENTLICHES RECHT 114 (1909); G. DAHM, VÖLKERRECHT 281 (1958).

The provisions of the Scandinavian laws referred to do not insist on the criminality of the offense concerned in the requested country, but only in Sweden and Norway, respectively. *See Traditional Extradition Law, supra* note 8. For a more thorough account of the Scandinavian approach, see KARLE, EUROPEAN COMMITTEE ON CRIME PROBLEMS: LEGAL ASPECTS OF EXTRADITION 52-55 (1970). Karle asserts that according to article 28, paragraph 3 of the ECE, extradition between Denmark, Sweden and Norway must take place on the basis of the uniform laws of these countries. Article 4 of the Swiss Extradition Law of 1892, SR 353.0, provided an exception to the requirement of dual criminality:

> *L'extradition pourra etre accordee pour une infraction comprise dans l'enumeration de l'art. 3 et punissable d'apres la loi de l'Etat requerant, lors meme quelle ne sevait pas specialement prevue par le droit du canton de refuge—ou de droit federal—se cette omission provient uniquement de circonstances exterieures, telles que la difference des situations geographiques des*

A more fundamental discussion among legal scholars, however, has centered on whether the terminology and the elements of the crime must be identically defined in the law of each country.[10]

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deux pay.

Id. art. 4. The IMAC has strictly provided for the principle of dual criminality. IMAC, *supra* note 1, art. 35.

10. Various scholars have reached different conclusions on this question. Some interpret the requirement of dual criminality quite liberally, *see* SCHULTZ, *supra* note 6, at 325; 1 GUGGENHEIM, *supra* note 3, at 325, while others treat the requirement literally. *See* PONCET & NEYROUD, *supra* note 6, at 21. *See also In re* Gillette, BG 91 I 130 (1965); *In re* Hornig, BG 88 I 37 (1962); The Federal Supreme Court in *In re* von Petersdorf, BG 39 I 390 (1913), followed the Swiss-German Extradition Treaty of 1874, A.S. I 1882 (abrogated), and rejected extradition because of a lack of accurate terminology in the request.

The IMAC, in article 35, paragraph 2, states:

> In determining if an act is punishable under Swiss law, special degrees of guilt and conditions of punishability shall not be taken into account, not even with respect to the personal and temporal scope of application of the provisions of the Swiss Military Penal Code [SR 321.0] concerning violation of public international law in case of armed conflicts and wartime looting as well as pillaging.

IMAC, *supra* note 1, art. 35, para. 2b. Similarly, under the ECE, which upon ratification has become Swiss law, extradition will be granted for offenses punishable under the laws of the requesting and the requested state by a deprivation of liberty of at least one year. ECE, *supra* note 4, art. 2, para. 1. Thus, the terminology of the offense (once explicitly enumerated, as in the United States-Switzerland Extradition Treaty of 1900, A.S. 12/267) has been superseded by the elements of the facts required to constitute and delineate an offense.

The Federal Supreme Court has waived the correct qualification of the offense so long as it was punishable. *In re* Mifsud, BG 101 I 410 (1975) (that perjury was punishable in England only upon testimony of two witnesses deemed irrelevant, because it is procedural not substantive). Likewise, in BG 101 I 592 (1975), the Court ruled that the different qualifications of the elements of fact were not sufficient to deny extradition. In fact, the Court stated that extradition would be granted if, according to both laws, the factual elements constitute a crime, no matter what the offense was labeled. *See also In re* Peruzzo, BG 77 I 55 (1951); *In re* Lazzeri, BG 87 I 200 (1961); *In re* Kroeger, BG 92 I 115 (1966).

In a more recent decision, the Court reaffirmed a liberal interpretation: "*Les èlements punissables dans l'Etat requérant ne doivent pas conformer à lesquelles d'Etat requis.*" *In re* Panamex, BG 109 I b 161 (1983). Apparently this interpretation is in accord with a prior decision, *see In re* Bohm, BG 108 I b 296 (1982), which granted an extradition request to Austria, despite the fact that under Austrian law fraud requires no profit motive (objective elements suffice), whereas Swiss law deems motive relevant. Dual criminality was affirmed, nonetheless, because the Court found that the Austrian concept of fraud corresponded to an offense punishable under Swiss law, which was extraditable.

In *In re* Gelli, BG 109 I b 312 (1983), the Court held that, even though Switzerland does not recognize an offense for a "fraudulent bankruptcy prior to bankruptcy proceedings being initiated," Italian law does recognize such an offense. *Id.* at 317. Hence, the elements of the offense were held to be satisfied prior to the initiation of the bankruptcy proceedings. *See also In re* Maurel, BG 109 I b 165 (1983); *In re* Suarez, BG 108 I b 525 (1982) (conspiracy although not a crime under Swiss law held to be an extraditable offense, irrespective of the terminology used, because the crime, although committed in the

C. *Extraditable Offenses*

The question of the legal terminology of offenses plays an extremely important role in judicial relations between countries, not only

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United States, was for the purpose of committing a drug trafficking offense under the International Drug Trafficking Convention and article 2 of the United States-Switzerland Extradition Treaty of 1900).

In an interesting case of dual criminality, in which the preparation or instigation to perpetrate a crime took place in Switzerland but the actual crime was committed elsewhere (the purchase of drugs in Spain, their transportation through Germany and their sale in Norway), Germany asked for and was granted extradition, although it had no jurisdiction over the instigator. *In re* Klingenbrunner, BG (unpubl.) (Sept. 5, 1984).

In two recent decisions, the Court did not require identical norms because only judicial assistance and no extradition was requested. Thus, a liberal interpretation was warranted. *See In re* I.C.C. Management Services S.A., (non-publ.) (July 7, 1984); *In re* Banque des Depots et des Gestions, BG (unpubl.) (March 7, 1984). Nonetheless, the Court has waived the requirement of a strict duplication of norms. *See In re* Marsman, BG 110 I b 187 (1984); *In re* Cauchie, 107 I b 264 (1981); *In re* Cicchelero, BG 103 I a 218 (1977).

The most interesting question, and one affecting political relations between the United States and Switzerland, arises in connection with securities fraud in the form of insider trading, which is punishable in the United States but is not a crime in Switzerland or most other European countries. Insider trading is not considered fraud, nor unfaithful management, nor a false business declaration. The problem arises when United States citizens, having insider information buy or sell securities using Swiss banks, and when discovered hide behind the Swiss bank secrecy laws. *See* Schueizerisches Bankgesetz, art. 47, 1934 A.S. 10 I 337, 71 I 808, RS 952.0.

A United States district court has ordered a Swiss bank to disclose the names of its clients to the Securites and Exchange Commission, despite the fact that such a disclosure might subject the bank to criminal sanctions under Swiss law, because the court found that the bank had purchased American securities in bad faith. SEC v. Banka della Svizzera Italiana 92 F.R.D. 111, 1981 Fed. Sec. L. Rep. (CCH) ¶ 98,346 (S.D.N.Y. Nov. 16, 1981). In ordering disclosure, the court was influenced by the fact that the bank had executed the transaction fully expecting Swiss law to shield it from the reach of United States securities law, and by the Swiss Government's failure to either object to the discovery or suggest that it be halted. *Id.* at 119. The court stated that it would be a travesty of justice to permit a foreigner to invade American markets, violate its law, withdraw profits and resist accountability for himself and his principals by illegally claiming their anonymity under foreign law. *Id.*

If, by virtue of this controversial judgment, a request for judicial assistance in criminal matters is made under the United States-Switzerland Extradition Treaty of 1900, *see infra* note 26, and in accordance with the IMAC, the United States would not have to show probable cause that the inside information, and the resulting illicit gain, would come under one of the offenses mentioned above and covered under the Swiss Penal Code, because probable cause is not required under Swiss law. In *In re* Santa Fe, BG 109 I b 47 (1983), however, the Court initially had to deny assistance because insider trading is not punishable in Switzerland. Elements of fact could possibly have been covered under "unfaithful management," Schueizerisches Strafgesetzbuch (STGB), art. 159, A.S. 3/203, RS 311, "fraud," STGB, art. 148, or a "violation of business secrets." STGB, art. 162, provided that the insider had passed the information to a "tippee," who had com-

because of the different systems of law, but also because of differing meanings in languages.

There is no doubt that the procedure of extradition requires a grave offense.[11] What is considered a grave offense in one country, however, might be considered quite trivial in another. Arab countries, for example, have considered the "violation of a harem" or "drinking in public" grave offenses while some Latin American countries insist upon the extradition of bigamists. Because international law has no established yardstick as to the gravity of an offense, the simple solution appears to be to let the requested State make the determination as to gravity. Some scholars and judges, however, view this as a position, which is too unilateral and one which results in a potential violation of the obligation to surrender.[12]

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pleted the transaction. All the above was considered insufficient by the Court in its first examination of the *Santa Fe* case. It was only when a second request was made by the United States, alleging a violation of business secrets and a passing of such information, that the Court granted assistance. *In re* Santa Fe, BG (unpubl.) (Nov. 30, 1983).

American legal opinion has not been as strict concerning dual criminality. *See* George, *supra* note 3, wherein Professor George suggests that requiring too strict a double criminality standard would inhibit the usefulness of international treaties. Instead, Professor George advocates a relative analysis. European opinion originally rejected this line of thought but has gradually come to accept it. Thus, although the ECE in article 1 is very explicit, the European Convention on Assistance in Criminal Matters, art. 1, para. 1, BBl 1966 I 457/75, RS 351.1, enacted only two years later, speaks only of offenses which are punishable under the law of the requesting country. Switzerland, although adhering to that Convention, made a reservation as to punishability. The main reason for the stricter rule may be the lack of a probable cause examination, and satisfaction with the formal correctness of a request and its assertion of an offense to be investigated.

The Court has adopted the American approach in *In re* Schulte, BG (unpubl.) (Nov. 4, 1984), and *In re* Chevarria Garcia, BG 110 I b 173 (1984). The Court has been more liberal in granting requests for judicial assistance and more strict in extradition requests. In two of the most recent insider trading cases, the Court upheld judicial assistance. *See In re* Musella, BG (unpubl.) (July 16, 1985); *In re* Chiaramonte & Rapaport (Ellis A.G.), BG (unpubl.) (Oct. 3, 1985).

The German Extradition and Assistance Law, para. 3, BGBl 1982 2071 explicitly allows a liberal interpretation by granting extradition if the offense is punishable under German law or if it is punishable according to the sense of the law. *Accord* United States-Italy Extradition Treaty, art. 2.

An interesting example concerning terminology appears in the differing definitions of "larceny" under Swiss and German law. Under the German penal code, theft is defined as "taking a mobile thing with an intent to wrongfully appropriate." STGB, para. 242. The Swiss penal code, however, defines theft as "taking a mobile thing in order to wrongfully enrich oneself." STBG, art. 137. Hence, Switzerland would not extradite a German "thief" who had enriched a third person and not himself in Germany, because the elements of fact are not sufficient to establish dual criminality.

11. *See infra* PART TWO § I, *C* and accompanying text.

12. In Factor v. Laubenheimer, 290 U.S. 276 (1933), the Supreme Court of the United

To some extent the problem has been solved in the past simply by listing the extraditable offenses. The United States has always adhered to this rule.[13] Domestic laws have also tended toward enumerating the offenses in question.[14] Italy, for instance, has tried to combine the enumeration with a system of exclusion,[15] which eliminates those offenses that are non-extraditable. Most modern agreements and treaties, including the IMAC,[16] stipulate only those offenses with maximum sanc-

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States affirmed the reversal of a decision of the District Court for Northern District of Illinois which had applied British law (the requesting country) because the offense of receiving money fraudulently obtained was unknown in the Illinois criminal laws. The Supreme Court's decision was highly criticized as being too liberal an interpretation of the treaty and as too easily overriding technical considerations.

13. *See, e.g.*, Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-Great Britain, 8 Stat. 116, T.S. No. 105; Webster-Ashburton Treaty of 1842, Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119; Extradition Convention, July 12, 1889, United States-Great Britain, art. I, 26 Stat. 1508, T.S. No. 139; Extradition Treaty, Dec. 22, 1931, United States-Great Britain, art. III, 47 Stat. 2122, T.S. No. 849; Treaty for the Extradition of Criminals, May 14, 1900, United States-Switzerland, art. II, 31 Stat. 1928, T.S. No. 354 - The Extradition Treaty of 1900 between the United States and Switzerland listed murder, arson, robbery, counterfeiting, forgery, alteration, embezzlement by public officials and salaried employees, larceny, obtaining money by false pretenses, receiving stolen, embezzled and fraudently obtained goods (at a minimum of 1000 francs), fraud, breach of trust, perjury, abduction, rape, kidnapping of minors, bigamy, abortion and willful destruction of a vessel, as extraditable offenses. *Id.* at art. II.

14. *See, e.g.*, British Extradition Act of 1870, 24 & 33 Vict., ch. 52, sched. 1. By Order-in-Council the British system is to extend this act to all countries with which a treaty has been entered. Thus, the British avoided the difficulty by listing in the act offenses for which extradition can be sought. Treaties could not expand this list. The old 1892 Swiss extradition law enumerated extraditable offenses and maintained this rule in reservations to various treaties and conventions. *See infra* note 16.

15. In the Extradition Treaty of 1868, Switzerland-Italy, 1868 BBl III 448, certain offenses that were unpunishable in Switzerland, such as *associazione per delinquere* (qualified conspiracy) if committed by three or more persons and preceeding the commission of a crime, became extradictable.

Although the ECE has abandoned the enumeration system, Italy, a signator of the ECE, in its domestic law, refers to crimes subject to extradition which are not enumerated and not excluded elsewhere. C.P. art. 13, para. 2, 28 Gaz. Uff. X 253 (1938). The United States-Italy Extradition Treaty of 1983, Oct. 13, 1983, art. II, No. 225 Gaz. Uff. (1984) permits extradition for more than one offense, if one of the offenses is punishable by imprisonment of one year or more. The other offenses, though extraditable, are minor.

16. The enumeration system is now obsolete. Although prior treaties did enumerate offenses, nearly all modern international accords and municipal laws specify the severity of punishment for the crime, mainly imprisonment of one year or more, as controlling. *See, e.g.*, Bundesgesctz über Auslieferung and Rechtshilfe in Strafsachen, para. 11(1), 1979 BGBl 529 (incarceration of more than one year in both countries); Loi relatif á l'extradition des estrangers, art. 4, 1927 J.O. No. 2068 (punishment of the act in the requesting country and incarceration for at least two years in France); ECE, *supra* note

tions, thus eliminating all other offenses.

4, art. 2, para. 1:

> Extradition shall be granted in respect of offenses punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.

Id. If a request has been made for more than one offense, one of which is not extraditable under article 2, the requesting Party is provided a faculative right to extradite for a lesser offense. *Id.* at para. 2. Any signatory, however, may exclude such a lesser offense from extradition. *Id.* Article 2 further permits any Convention signatory to make reservations listing the offenses that such signatory wishes to consider extraditable. *Id.* at para. 4. In fact, Switzerland had always adhered to the system of enumeration—*see* Swiss Extradition Law of 1892, 3 Bundessammlung (BS) 509 (abrogated). The enumerative system had an important restrictive effect in that it made crimes not extraditable, even on basis of reciprocity, if these crimes were not explicitly enumerated. *See* PONCET & NEYROUD, *supra* note 6, at 21. When ratifying the ECE, Switzerland made certain reservations, BBl 1976 319, and as an annex to these reservations, enumerated all offenses extraditable in accordance with the then still valid 1892 extradition law. The annex lists the commission, the attempted commission or being an accomplice to the commission of the following offenses:

> *Offenses Against Persons:* Voluntary homicide with premeditation, voluntary or culpable homicide. Infanticide and abortion. Exposure or abandonment of children and defenseless persons. Injuries resulting in death or lasting infirmity or inability to work for 20 days or more. Participation in an affray with that result. Mistreatment of parents by their issue and vice-versa or by persons under whose authority the children had been placed.
>
> *Offenses Against Freedom of Persons and Family Rights:* Abduction by force, menace or fraud. Unlawful restraint, kidnapping of minors. Violation of domicile. Menacing to attack persons or property. Falsification or destruction of documents regarding a civil status.
>
> *Offenses Against Morality:* Rape, indecent assault by force or against a defenseless or mentally incapacitated person. Indecent acts on children or on anyone under the offender's care. Corruption of minors by parents, guardians or others entrusted with their care. Professional procuring and trafficking in women and children. Acts of indecency resulting in a public scandal. Incest. Bigamy.
>
> *Offenses Against Property:* Piracy, extortion, theft and receiving stolen goods. Misappropriation and breach of trust. Willful damage to property. False pretenses, fraudulent bankruptcy, and fraud in connection thereof.
>
> *Offenses Against the Public Faith:* Counterfeiting or forging coin, money, stamps, bonds, shares, other securities issued by the government or corporations or individuals. Introduction and issuing into circulation thereof with intent to defraud. Forgery of seals and misuse thereof. Forgery of documents and using of such documents with the intent to defraud. Misuse of blank-signed paper or moving boundary signs, with intent to defraud.
>
> *Offenses Causing a Public Danger:* Arson, misuse of explosives, flooding by intent or gross negligence. Destroying railroads and damaging thereof, intentionally or by gross negligence, also steamboats, postal and electrical installations and equipment with the intent to endanger their use for the public or individu-

In addition to prosecuting a suspect for an offense, extradition laws and treaties also contain the conditions for extraditing a convicted offender. The sentence pronounced, however, must be of some gravity.

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als. Acts liable to ground a boat or destroy it. Spreading of contagious diseases by intent or gross negligence. Impairing of springs, wells or other resources endangering the public. Intentional adulteration and imitation of foodstuff endangering human health or animal health. Selling such foodstuffs concealing their harm. Drug trafficking if punishable by imprisonment.

Offenses Against the Administration of Justice: False accusation. Perjury or misrepresentation under solemn promise. False evidence, false expertise, false translation. Subordination of witnesses, experts and interpreters.

Offenses Concerning the Exercise of Official Duties: Bribery of officials, jurors, arbitrators and experts. Misappropriation and extortion by public officials. Abuse of authority as a result of such bribery or with fraudulent intent. Destruction of postal matters and violation of postal secrets by Post Office employees. Sec. 154 of the Fed. Act of Sept. 23, 1953 [1967 A.S 319, RS 170.32]. Shipping under Swiss flag provides extradition for offenses under that Act that are punishable by one year or more in jail, such as intentional or negligent acts, thus endangering vessel, shipping, etc., failure to give assistance, abandonment of vessel in peril, abuse of authority, drunkenness, disobedience, smuggling, misuse of flag, registration, fraud and improper transfer.

Swiss Reservations to the ECE, 1967 BBl 319.

Upon filing these reservations, Switzerland had no obligation to surrender suspects for offenses not listed therein. The IMAC replaced the enumeration of offenses with the general maxim stipulated in article 35, which permits extradition for offenses punishable by deprivation of liberty of one year or more. IMAC, *supra* note 1, art. 35. An additional limit set by the IMAC regards the importance of the offense as such. *See infra* PART ONE § III, *C.* It may be debated that the list annexed to the reservations has not automatically been superceded by the IMAC. This does not appear to be the case, however, because the ECE is an international obligation while the IMAC is a voluntary measure; a matter of pure comity. To what extent an individual may be affected is, of course, another matter which will be discussed in PART ONE § II, *C.* The message of the Federal Council reporting the draft to Parliament, 1976 BBl .033, does not explicitly cover the matter.

In *In re* Miller, BG 107 Ib 274 (1981), the Court decision was in favor of extradition if there was suspicion of drug trafficking, irrespective of whether the crime was mentioned in the treaty. *See also In re* Grosby, BG 97 I b 372 (1971).

The Second Additional Protocol to the ECE of April 1978, opened for signature as of March 17, 1978, extends extradition to "offenses which are subject only to pecuniary sanctions." Second Additional Protocol to the European Convention on Extradition, Mar. 17, 1978, ch. 1, art. 1, Europ. T.S. No. 98 (1978) [hereinafter ECE Second Protocol]. Individual suspects would then have no protection if the requested country decided to grant extradition upon a request from abroad. This protocol has been ratified by most of the ECE signatories. Switzerland is one of these signatories but with a reservation as to article 2, regarding fiscal matters, and effective June 1, 1985.

If execution or extradition is requested for a pronounced final sentence, it is up to the requested State to choose. Whatever decision is made, however, the requesting State must clearly assert what portion of the sentence remains to be served, and this may influence the decision. *See In re* Bonascossa, BG (unpubl.) (June 19, 1984).

Thus, the ECE stipulates for a minimum of four months imprisonment,[17] while the IMAC speaks simply of any sanction with deprivation of liberty.[18] The principle is laid down in article 94 of the IMAC, whereby final and enforceable criminal judgments rendered in another jurisdiction may be executed in Switzerland under certain conditions, for example residence in Switzerland or practicability.[19] If these conditions do not exist, however, then extradition applies by *argumentum ex contrario.*

D. Probable Cause

United States law requires a certificate of probable cause by a judge associated with the executive authority authorizing the surrender.[20] Such a certification, is based upon facts constituting a prima facie case. In Europe, on the other hand, with the exception of Great Britain, a prima facie case is not required.[21] This often creates conflicts because Europeans—following Roman law in this respect—have no counterpart to the probable cause requirement of the Anglo-Saxon extradition law. European petitions thus must withstand an examination of the facts presented, whereas American or British requests are not so examined.[22] The underlying reason for the different approach most probably lies in the concept of absolute sovereignty, the degree of confidence or its lack thereof in the allegations of the foreign authority, and the greater respect for the rights of the individual by the Anglo-Saxon system of law. In Europe, except in England, the individual has very little protection against arbitrary allegations by a government official—unless he is a national of the requested country; then he generally enjoys "immunity"—emanating from abroad.

This great difference in approach to individual rights played an important part in negotiations for a new Italian-United States Extradition Treaty of 1983, in which, during the course of combatting international and organized criminality, the United States "caved in" to demands by the Italians to waive the probable cause requirement, in order to gain some kind of compromise between a judicial certification and a simple allegation by prosecuting authorities. The result was a

17. ECE, *supra* note 4, art. 2(1).

18. IMAC, *supra* note 1, art. 32.

19. *Id.* art 94, paras. a - c.

20. 18 U.S.C. § 3184 (1982).

21. *See* the Treaty for Mutual Surrender of Fugitive Criminals, Nov. 26, 1880, Great Britain-Switzerland, 157 Parry's T.S. 214, in which Switzerland acceded to the Anglo-Saxon requirement of probable cause.

22. This possible dilemma is referred to in the Message of the Federal Council regarding the Swiss Extradiction Law of 1892. 1890 BBl III 360.

statement of facts, "pertinent evidence" and conclusions furnishing a "reasonable base" to believe that the individual had committed the offense. Thus, it appears that no judicial certification is required for surrender; instead, the "magistrate's word" is taken.[23] It is now the sus-

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23. The Swiss Supreme Federal Court in Fiorini v. Federal Public Ministry, BG 101 I 592 (1975), declined to examine the facts and stated that a petition would be rejected only for obvious mistakes, thus changing the burden of proof. Under the IMAC, a request is refused "if tainted with grave defects." IMAC, *supra* note 1, art. 2, para. d. The Swiss Court will examine only concrete criminality. *See In re* Herren, 57 BG I 15 (1931). Professor Hans Schultz supports this standard of review. *See* SCHULTZ, *supra* note 6, at 234; *contra*, 1 GÜGGENHEIM, *supra* note 3, at 325.

In *In re* Panamex, BG 109 I b 158 (1983), the Swiss Federal Supreme Court rejected the necessity of examining criminal qualifications of facts presented in the request, according to United States law. The Court only allows such an examination when there is an obvious error or contradictory statement. *See In re* Chiaramonte & Rapaport (Ellis AG), BG (unpubl.) (Oct. 3, 1985). The Court has also ruled that a suspect's guilt is not a matter to be examined by Swiss authorities, rather this is to be reserved for the prosecuting or judicial authorities of the requesting State. *See In re* Federici, BG 109 I b 60 (1983). The exception is set forth in article 53 of the IMAC, i.e., when the suspect asserts an unequivocal and uncontested alibi. IMAC, *supra* note 1, art. 53. The Court has affirmed this exception, irrespective of the ECE. *See In re* Gelli, BG 109 I b 367 (1983).

For a discussion of the scope of examination, *see, e.g., In re* Schlegel, BG 101 I a 610 (1975) (limits examination to determine whether requesting documents allege an extraditable offense; *In re* Leoment, BG 103 I a 326 (1977) (proof of personal identity is a matter of due course); *In re* Hornig, BG 88 I 37 (1962) (request rejected only because of an obvious error).

Requests often need not be accompanied by evidence. *See, e.g., In re* Charles McVey-Credit Suisse, BG (unpubl.) (Feb. 8, 1984); *In re* Gutzwiler, BG (unpubl.) (Jan. 11, 1984); *In re* Schlumpf, BG 106 Ia 260 (1980); *In re* Sternberg, BG 103 Ia 210 (1977). The Court also often refuses to examine the nature of foreign prosecution. *See In re* Kruell, BG (Unpubl.) (May 11, 1984) (waives examination as to whether foreign law requires prosecution upon a complaint only, or whether such prosecution takes place ex officio); *In re* Marsman, BG 110 I b 187 (1984) (waives examination of defaults in foreign prosecution intended to be initiated after surrender); *see also In re* Knevels, BG (unpubl.) (Mar. 7, 1984); *In re* Baskaya, BG 109 I b 164 (1983); *In re* Interdean, BG 107 Ib 254 (1984).

The Court has held that neither details of the offense nor the facts of the case need be examined. *See In re* Meyro, BG (unpubl.) (Oct. 24, 1984). In *In re* Beck, BG (unpubl.) (Nov. 26, 1984), the Court went so far as to state that a suspect's knowledge or ignorance regarding the illicit origin of fraudulently obtained funds was irrelevant. *See also In re* Amos Calmasini, BG (unpubl.) (Mar. 14, 1985). In *In re* Trust and Investment (arndt), BG (unpubl.) (Mar. 18, 1985), although the Court declined to examine questions of United States law in granting judicial assistance to the United States, the Court indicated that it would not be so generous if it were confronted with a request for extradition. The Court has declined to discuss the purpose of the request as long as there is an allegation of a criminal act and the intent by a foreign sovereign to initiate a criminal proceeding. *See In re* Gelbard, BG (unpubl.) (Feb. 20, 1985). (Feb. 20, 1985). *See also In re* Macchara Seamus, BG (unpubl.) (Oct. 31, 1984) (possession of explosives need not be proved by Ireland and the intent of an illicit use thereof is assumed, hence a suspect

pect that must prove that he is innocent, as has been the rule on the European Continent. There, as in Switzerland, the only proof admitted is the physical absence from the scene of the crime—an alibi.[24]

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must prove a contrary intent because possession alone is not an extraditable offense). *Accord* Deutsches Rechtshilfe Gesetz, para. 10, 1982 BGBI 2071 (no proof necessary, only an assertion of an offense by a foreign prosecuting authority is sufficient).

In 1987, the Fourth Congress of the Association of Jurists, Italy-United States-Switzerland adopted a resolution calling for a revised treaty between the United States and Italy (the Swiss representatives abstained) and especially called for a modification of article V requiring "probable cause" for extradition. United States-Italy Extradition Treaty, Oct. 9, 1975, art. V, No. 632, 1975 Gaz. Uff. This probable cause requirement was revised in the 1983 extradition treaty between Italy and the United States. United States-Italy Extradition Treaty, Oct. 13, 1983, art. X, No. 225, 1984 Gaz. Uff. Article X calls for a request with documentation of the identity of the person, a statement of facts, available proof and conclusions furnishing reasonable grounds to believe that the offense was committed by the suspect. This statement must be made by the prosecuting authority. Article X could be termed a modified probable cause clause because some proof is still required, possibly more than prima facie evidence. Italy applied this requirement in denying extradition of the leader of the Palestine Liberation Organization gang which killed the crippled American, Leon Klinghoffer, while seizing the *Achille Lauro* in October 1985. There has been, as yet, no case concerning an Italian request for extradition to the United States that has been examined by the United States courts.

The distinguished Italian Scholar Professor Paolo Mengozzi has written an excellent commentary on the new United States-Italian Treaty, especially with regard to the probable cause and prima facie requirements. Mengozzi, *Rassegna dei Trattati Internazionali de Interesse Privatissimo*, 8 LE NUOVE LEGGI CIVILI COMMENTATE 610 (1985). The "due process clause" rule formerly required of the certification, that there exist a probable cause to believe that the offense had been committed by the individual over whom extradition was sought. Thus, the Italian authorities were unable to reciprocate upon a United States request. Solely for reasons of better combatting international crime, terrorism and organized crime operations, including drug trafficking, the United States Government was prepared to modify the clause. Mengozzi cites the fact that, in the ten years preceeding 1981, the United States granted three requests for extradition, whereas Italy conceded 90 requests. The new treaty was supposed to bring a drastic change.

According to Mengozzi, to whose opinion most Italian lawyers adhere, the probable cause requirement under article V of the old United States-Italian extradition treaty has been replaced by article X of the new treaty. Mengozzi interprets the *causa probabile* under United States law when the United States is the requested State as being replaced by the prima facie evidence required under Italian law. Mengozzi, however, expresses doubts as to the correct interpretation and application of Italian jurisprudence by United States courts. The sponsors of the resolution, adopted by the Fourth Congress of the Association of Jurists, *see supra*, apparently had other ideas. It appears that they did not sufficiently consider basic American rules, which could hardly have been modified. The "reasonable ground to believe" that the suspect to be surrendered has in fact committed the offense, which still must be certified by the judge, is certainly somewhat less than a "probable cause" showing. The idea that an Italian prosecuting officer would replace the United States judicial authority seems far-fetched. Who is presenting the request for extradition seems less relevant than who ultimately decides the request. Mengozzi, *supra* at 618.

24. *See* IMAC, *supra* note 1, art. 53 (when an alibi is presented, an investigation is

II. DOMESTIC LAWS—TREATIES—CONVENTIONS

A. Obligation and Comity

Domestic or municipal laws governing extradition exist in nearly all countries today. These laws set forth the conditions for the surrender of an alleged offender. In some countries the rules are enacted as part of a code.[25] Because adherence to domestic laws is a matter of comity, these laws impose no obligation on the requested State to extradite, nor do they confer a right to demand extradition and international cooperation. Such rights are exclusively conferred by treaties or conventions.[26] The general rule is that multilateral conventions prevail

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necessary); *In re* Sifoni, BG 109 IV 174 (1983). *See also In re* Zahn, BG 109 I b 174 (1983) (the Court discusses ex officio examination of alibi); *In re* Gabardi, BG (unpubl.) (Mar. 6, 1984); *In re* Zaka Ullah, BG (unpubl.) (Feb. 22, 1984) (proof of physical absence); *In re* Beck, BG (unpubl.) (Nov. 26, 1984) (no proof of physical absence in case of bribery).

25. Title 18 U.S.C. § 3184 (1982); Codice Penale (C.P.) art. 13, in conjunction with Codice di procedura penale (C.P.P.) art. 661; Deutsches Rechtshilfe Gesetz, 1982 BGBl 2071 (W. Ger.); Bundesgesetz über Auslieferung und Rechtshilfe in Strafsachen, 1979 BGBl 529 (Aus.); British Extradition Act of 1870, 33 & 34 Vict., ch. 52; IMAC, *supra* note 1.

26. Switzerland has concluded 23 treaties of extradition listed hereunder:
Agreement: Supplement to the European Convention on Mutual Assistance on Crime, Nov. 13, 1969, Switzerland-Germany 1977 BBl 97 RS. 351.913.61; Convention for Extradition of Criminals, Nov. 21, 1906, Switzerland-Argentina, 12 A.S. 59, RS. 353.915.4, 203 Parry's T.S. 147; Extradition Treaty, July 23, 1932, Switzerland-Brazil, 12 A.S. 77, RS. 353.919.8, 145 League of Nations Treaty Series [L.N.T.S.] 167; Treaty of Peace, Establishment and Commerce and Extradition Convention, Oct. 30, 1883, Switzerland-Salvador, 12 A.S. 77, RS. 353.932.3, 162 Parry's T.S. 475; Treaty of Extradition and Judicial Assistance in Criminal Matters, Nov. 19, 1937, Switzerland-Poland, 12 A.S. 207, RS. 353.364.9, 195 L.N.T.S. 297; Extradition Convention, Nov. 17, 1873, Switzerland-Russia, 12 A.S. 251 RS. 33.977.2, 146 Parry's T.S. 455; Extradition Treaty, Feb. 27, 1923, Switzerland-Uruguay, 12 A.S. 258, RS. 353.977.6, 63 L.N.T.S. 207; Extradition Treaty, Nov. 28, 1887, Switzerland-Yugoslavia, 12 A.S. 149, RS. 353.981.8; Exchange: Extradition, Sept. 21, 1965, Switzerland-Uganda, 1966 A.S. 931, RS. 353.96.8. Exchange: Extradition, Nov. 28, 1955, Switzerland-Pakistan, 1955 A.S. 1146, RS. 353.962.3; Exchange: Extradition Under 1874 Belgian-Swiss Convention, June 30, 1971, Switzerland-Rwanda, 1971 A.S. 1813, RS. 353.966.7; Exchange: Extradition, Sept. 28, 1967, Switzerland-Tanzania, 1968 A.S. 163, RS. 353.973.2. Agreement: Completion of 1959 European Convention on Mutual Assistance in Criminal Matters, June 13, 1972, Switzerland-Austria, 1974 A.S. 1997, RS. 353.916.31. Extradition Convention, May 13, 1874, Switzerland-Belgium, 12 BBl.196, RS. 353.917.2, 147 Parry's T.S. 455; Treaty of Amity, Establishment and Commerce and Provisional Extradition Arrangement, June 22, 1888, Switzerland-Equador, 12 BBl. 94 RS. 353.932.7 171 Parry's T.S. 95; Extradition Treaty, August 31, 1883, Switzerland-Spain, 12 BBl. 229, RS. 353.933.2; Extradition Treaty, May 14, 1900, Switzerland-United States, 12 BBl. 267, RS. 353.933.6, 11 U.S.T. 904, [hereinafter United States-Switzerland Extradition Treaty of 1900]; Extradition Convention, July 9, 1869, Switzerland-France, 12 BBl. 96, RS. 353.934.9 Parry's T.S. 377; Treaty for the Mutual Surrender

over treaties, and treaties prevail over domestic laws.[27]

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of Fugitive Criminals, Nov. 26, 1880, Switzerland-Great Britain, 12 BBl. 114, RS. 353.936.7 157 Parry's T.S. 213 [hereinafter Great Britain-Switzerland Extradition Treaty of 1880; Extradition Treaty, Mar. 10, 1896, Switzerland-Austria-Hungary, 12 BBl. 184, RS. 353.941.8, 182 Parry's T.S. 336; Extradition Convention, Dec. 10, 1885, Switzerland-Monaco, 12 A.S. 168, RS. 353.956.7 167 Parry's T.S. 73; Extradition Convention, June 30, 1906, Switzerland-Paraguay, 12 A.S. 199, RS. 353.963.2 202 Parry's T.S. 127; Extradition Convention, Oct. 30, 1873, Switzerland-Portugal, 12 A.S. 216, RS. 353.965.4 146 Parry's T.S. 437.

Several agreements have been concluded between Switzerland and successor countries to some of the original signatories to the above treaties, like the Fiji Islands, Fidschi, Ireland, Mandates of Africa (for Great Britain) Jordan, Solomon Islands, Indonesia, New Guinea (Great Britain) and a few African countries (France). The only convention to which Switzerland is a signatory is the ECE.

27. The IMAC states: "[P]rovided that international agreements do not provide otherwise, this act shall govern all procedures of international cooperation in criminal matters . . . . " IMAC, *supra* note 1, art. 1. The ECE provides:

> 1. This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two contracting Parties.
>
> 2. The contracting Parties may conclude between themselves bilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.
>
> 3. Where, as between two or more contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provision of this Convention . . . .

ECE, *supra* note 4, art. 28. This general rule permits a signatory to go beyond what it is obligated to concede under an agreement, but never to concede less.

For a discussion of the rule that treaties supercede municpal law, see SCHULTZ, *supra* note 6, at 134; A. BILLOT, TRAITRÉ DE L'EXTRADITION 123 (1874); F. VON MARTITZ, INTERNATIONALE RECHTSHILFE 525 (1897).

Regarding decisions by the Swiss Court giving treaties precedence over municipal law, *see In re* Maurel, BG 109 I b 165 (1983); *In re* Grosby BG 97 I 387 (1971); *In re* Gilette, BG 91 I 127 (1965); *In re* Ktir, BG 87 I 134 (1961). The Court has given Swiss authorities the right to take measures outside a treaty if there is no apparent conflict between the treaty and the municipal law, or if the municipal law provides for more concessions to the requesting State. *See In re* Miller, BG 107 I b 276 (1981). The latter rule is limited to assistance and does not apply to extradition requests; however, even in cases of assistance, the rule appears controversial. *See* de Capitani, *Internationale Reehtshilfe—eine Standortsbeshimmung*, 100 ZEITSCHNFT FÜR SCHWEIZENSCHES RECHT 384 (1981). Clearly, though, the IMAC can supplement a treaty if that treaty is silent on a given matter, notwithstanding the preeminent status of the treaty. *See In re* Gutzuiler, BG (unpubl.) (1984). Likewise, the IMAC will control when there is no applicable treaty. *See In re* I.C.C. Management Service S.A. BG (unpubl.) (Mar. 7, 1984); *In re* Chabbah, BG (unpubl.) (Apr. 17, 1985).

In some States treaties are self-executing. *See, e.g.*, Bundesgesctz Ber Auslieferung und Rechtshilfe in Strafsachen, para. 1, 1979 BGBl 529 (Aus.). *Compare* the "Austrian theory" established by Lammasch, H. LAMMASCH, AUSLIEFERUNGPFLICHT UND ASYLRECHT 614 (1887) *with* the principle: "A treaty may limit the commitment to extradite, but

B. *Reciprocity*

Reciprocity is really a contract involving a particular case of extradition, and as a result there are no definite rules of reciprocity with regard to extradition laws. The notion that sovereignty demands an assurance of equal treatment by the requesting country in the future, prior to granting extradition, is long obsolete. Extradition is not an instrument of political power but one of judiciary decision. The assistance given to a foreign State, although primarily in the interest of that State, is no longer a sacrifice for the requested State. Therefore, reciprocity loses its meaning, as far as the judicial process is concerned.[28] Hence, unless a treaty provides otherwise Switzerland does not require a reciprocity when it grants assistance to a requesting state.[29]

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never the right to do so." This principle offers no protection whatsoever to the individual but soley stipulates the right and obligation of sovereign States to each other.

France is not explicit in its law; it simply determines the application of the law when no treaty exists. *See* Loi relatif à l'extradition des etrangers, art. 1, 1927 J.O. No. 2068: "*En absence de traite, les conditions, la procedure et les effets de l'extradition sont determines par les dispositions de la present loi.*"

28. Schultz, quotes the old maxim adopted by the Institute of International Law at Oxford in 1880, article 5: "[T]he condition of reciprocity . . . may be governed by policies, it is not required by justice." *Traditional Extradition Law, supra* note 8, at 10. The idea of equality among contracting States might well play a role in deciding upon a request for reciprocity when such a request for extradition is made and when no treaty exists. An obligation undertaken by Switzerland is based upon that idea. *See* PONCET & NEYROUD, *supra* note 6, at 27. A declaration of reciprocity does not, however, confer a right to grant extradition; the grant of extradition must be compatible with Swiss law, irrespective of any declaration of reciprocity or a government's acceptance thereof. *See In re* Zahabian, BG 89 I 200 (1963).

29. Under the IMAC: "As a rule, a request shall be granted only if the requesting State guarantees reciprocity." IMAC, *supra* note 1, art. 8. This article of the IMAC in no way confers upon an individual the right to demand denial of the request for extradition to a country not guaranteeing reciprocity. This problem might arise in cases of extradition proceedings brought by countries with whom Switzerland has no agreements (treaties or co-signatories of conventions), expecially if the political system differs from that of (Western orientated) Switzerland. As far as countries that extradite only on the basis of a treaty, like Benelux or Anglo-Saxon countries, it is doubtful whether reciprocal arrangements can be made at all. Such agreements are concluded with treaty partners. *See, e.g.*, Supplemental Treaty, Switzerland-Great Britain, AS 51/450 (1935) on certain technical and legal problems in the procedure. In the treaty with Great Britain, Switzerland reserved the right to deny a request for the extradition of Swiss nationals. Britain did not reserve such a right and, in fact, will surrender its own subjects. When presented with a request for extradition from Switzerland, Britain will apply the rule of probable cause. In other words, reciprocity is no ius cogens and Switzerland could extradite without it. *See* PONCET & NEYROUD, *supra* note 6, at 27 n.34. The lack of reciprocity is relevant, however, with regard to the concept of a political crime. *See In re* Morlacchi, BG 101 I a 602 (1975). United States law explicitly conditions extradition upon a treaty, and

In the ECE, the principle of reciprocity appears respected in article 2, paragraph 7 and article 26, paragraph 3.[30]

This is not to say that Switzerland will not be interested in receiving assurances of reciprocity from other countries with regard to the interpretation of fiscal and political offenses, inasmuch as they may be the subject of judicial assistance in the future. Professor Hans Schultz, in his treatise *La Convention Européenne,* believes that reciprocity also applies to the interpretation of terms like "political," "military," "fiscal offense;" and that Switzerland can and ought to demand a guaranty from the requesting State that a term in question be equally interpreted by that State in the future upon a Swiss request.[31] The fail-

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does not require or allow extradition outside the specific dictates of an applicable treaty, whether that treaty is reciprocal or not. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

The German and Austrian extradition laws are similar to article 8 of the IMAC. *See* DEUTSCHES RECHTSHILFE GESETZ, § 5, 1982 BGBl 2071; BUNDEGESETZ ÜBER AUSLIEFERUNG UND RECHTSHILFE IN STRAFSACHEN, para. 5, 1979 BGBl 529.

30. "Any Party may apply reciprocity of any offenses excluded from the application of the convention under this article" ECE, *supra* note 4, art. 2, para. 17 (referring to extraditable offenses): "A contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision." *Id.* art. 26, para. 3. Thus, States that, do not require reciprocity under their own domestic law, are able to extradite without such reciprocity. They are, however, not obligated to do so in the absence of such provision.

31. The request for such assurance of reciprocity has a valid purpose for the application of extradition for offenses that may or may not be excluded, according to the interpretation of the legal elements of the offense. There may be an interest in assuring that the requesting state will behave likewise in the future. A Swiss declaration of reciprocity has thus been given to Austria on certain matters of extraterritorial jurisdiction. Exchange of Notes, Austria-Switzerland, 42 A.S. 172, 1767 BBl II 249-50 (1926). The particular offense may not be in the treaty, or the signatories of the treaty might not agree on the terminology of a certain offense, its legal qualifications or its factual elements. Switzerland will make such declarations on the basis of its Constitution, Bundesverfassung [B. Verf], art. 102, para. 8 (Switz.), imposing upon the Federal Council the duty to protect Swiss interests in foreign affairs. The 1892 extradition law empowered the Federal Council to give such declarations even in case of a treaty, provided such treaty did not enumerate the offenses. 1892 Extradition Law, BS 3/509 art. 1, para. 2 (abrogated). *But see* United States-Switzerland Extradition Treaty of 1900, *supra* note 26. This restriction no longer exists under IMAC; the debates on the limits of State power in this respect are thus eliminated. *See* W. BURCKHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG 657 (1931); GUGGENHEIM, *supra* note 3, at 64; 2 J. BERNARD, TRAITÉ THEORIQUE ET PRATIQUE DE L'EXTRADITION 65-66 (1890); A. BILLOT, TRAITE DE L'EXTRADITION, 302 (1874). Nonetheless, even with the IMAC's authority, it is questionable whether the Federal Council could adversely affect individual rights by granting reciprocity. An offender who has escaped to a certain country relying upon an existing treaty and its protection cannot and should not be exposed to an unexpected process and suddenly be confronted with a declaration of reciprocity that would lead to his extradition.

ure to obtain such declarations on interpretations may result in the denial of extradition even though it may be in the interest of the requested State to grant it.[32]

C. *Individual Rights and State Liability*

Although the IMAC, in accordance with article 1, paragraph 1, confers no rights upon a foreign country to demand judicial assistance, it definitely provides for the ample protection of individual rights in favor of the suspect or the convict whose extradition is being sought. Section 2 of chapter 1 of the IMAC (exclusion of requests) and Section 2 of chapter 3 of the IMAC (protection of rights) in fact furnish the complete "bill of rights" for his defense.[33] In view of the precedence taken by international agreements over the IMAC, the problem arises,

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In England, a reciprocal deal would be illegal if the law of the other country excludes extradition without a treaty. *See* British Extradition Act of 1870, 24 & 33 Vict., ch. 52. The United Kingdom-Switzerland Extradition Treaty of 1880, *supra* note 6, has been extended and extradition may be granted only if the offense is extraditable in both countries. *See* 51 A.S. 450 (1935); *cf.* Netherlands Extradition Act of 1875, Staatsblad voor het Koninkrijk der Nederlanden [Stb.] No. 39 (1967).

32. H. SCHULTZ, LA CONVENTION EUROPÉENE 321 (1971). This treatise was published in Liege, Belgium, in honor of the famous lawyer Jean Constant. It seems that it is impossible to obtain assurances of identical interpretations of legal terms involving fiscal offenses (and possibly other "economic offenses") because various Western democracies have very different concepts of these terms. *Compare* France and Italy *with* Switzerland. Likewise, it is unlikely that Western nations will agree on an identical definition of a "political offense."

33. In Morlacchi v. FPM, 101 BG I a 602 (1975), the Swiss Supreme Federal Court granted extradition after rejecting a political offense exception, notwithstanding the fact that Italy would give it a different interpretation. The Court followed the rule that foreign law interpretation is irrelevant for an extradition request, but in effect the decision was a waiver of reciprocal agreements for political offenses. A similar result was reached in *Mifsud*, BG 101 Ia 410 (1975), which concerned the unfortunate lack of reciprocity in the examination of the factual elements of a crime, because of the failure to legislate something like a "probable cause" test with countries that use such a test as a basic prerequisite for extradition.

The need for a declaration of reciprocity is not so relevant in cases of judicial assistance only. In *In re* Chavaria Garcia, BG 110 I b 173 (1984), the Court ruled that a declaration of reciprocity does not necessarily have to be received when judicial assistance and not extradition is requested. Thus, article 8, paragraph 2 of the IMAC allows for a waiver of reciprocity. Of course, reciprocity is not needed when there is a treaty. *See In re* Gelbard, BG (unpubl.) (Feb. 20, 1985) (Treaty with Argentina). In a situation in which there is no treaty, Switzerland will insist on a declaration of reciprocity. *See In re* Chebbah, BG (unpubl.) (Apr. 17, 1985). In a recent decision, however, the Court apparently reversed itself by ruling that, whether or not a treaty was in effect, Switzerland could demand a declaration of reciprocity, although it was not obliged to do so. The suspect to be extradited may not invoke the clause. *See In re* Boccardi, BG (unpubl.) (June 14, 1985).

however, of an individual's being adversely affected by such an international agreement.[34]

The doctrine that public international law does not establish a relationship between the authority and the individual but only between sovereign states—signatories of treaties and conventions—must gradually yield to a more liberal maxim conveying a proper standing to the individual vis-à-vis the sovereign State.[35] Switzerland, therefore, following the British example,[36] and with a view toward avoiding such

34. The IMAC lists possible procedural defects, IMAC, *supra* note 1, ch. 1, § 2, art. 2, limits extradictable offenses based on their nature, *id.*, ch. I, art. 3, and mandates that the offense must be serious. *Id.* ch. 1, § 2, art. 4. Procedural rights (such as the right to counsel) are also set forth in the IMAC. *Id.*, ch. 3, § 3.

35. The rule that treaties take precedence has been established by the Swiss Federal Supreme Court. *See* Hachette v. Societe Cooperative d'Achat et de Distribution des Negotiants en Tabaca, Journaux et Consorts, BG 93 II 192 (1967); Thareau v. FPM, BG 100 I a 407 (1974); Lanusse v. FPM, BG 102 I a 317 (1976); Veraldi v. FPM, BG 103 I a 616 (1977). It has been argued that, if treaties take precedence, the extradition law goes beyond the obligation to grant assistance and should never be applicable against the interests of the individual when he can rely upon the more favorable provisions of a treaty. It is debatable, however, whether there would be any such adverse effect on the interests of the individual. Many Swiss authors, though, differ and question the ability of the IMAC to grant to foreign states what they do not receive on the basis of a treaty or convention. *See* 100 Zeitschrift für Schweizerisches Recht 495-602 (Swiss Law Association Meeting, September 26, 1981, at Saint Gall). Dr. W. De Capitani has argued that the IMAC should be subrogated to a treaty in which the treaty favors the individual affected. de Capitani, *supra* note 27, at 386-90.

36. *See generally* Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L. J. 236, 247-52 (1982-83). Is a treaty containing provisions conferring rights on individuals—citizens of contracting states—self-executing? The answer is yes when the treaty "prescribes rules by which private rights may be determined, and only when it may be relied upon for the enforcement of such rights." Dreyfuss v. von Finck, 534 F.2d 24, 30 (2d Cir.) *cert. denied*, 429 U.S. 835 (1976). *Accord.* Cohen v. Hattman, 490 F. Supp. 517, 519 (S.D. Fla. 1980), *aff'd*, 634 F.2d 318 (5th Cir. 1981). In Filartiga v. Pena-Irala, 630 F.2d 876, 884-85 (2d Cir. 1980), the court held that international law may address a relationship among individuals thus conferring "fundamental rights upon all people vis-à-vis their own governments." *Id. Filartiga*, no doubt, implies a private cause of action contrary to preceeding decisions. The United States courts have asserted that international law, as a constantly evolving process, is reflected in a growing body of agreements and defines norms of international behavior. This view allows for the incorporation of universally accepted principles into common law, enforceable everywhere, without explicitly providing for a private cause of action. Thus, there is an implicit recognition of the main and basic task of international law: the safeguard of individual rights. Swiss doctrine has not yet arrived at a similar conclusion, but the absolute negation of such rights in international law, prevailing heretofore, is receding. *See* GUGGENHEIM, *supra* note 3, at 212. 1 DAHM *supra* note 9, at 54. Swiss Supreme Court cases indicate a similar trend. *See In re* Thareau, BG 100 I a 416 (1974); *In re* Lanusee, BG 103 I A 206 (1976). The IMAC is too recent to have been "tested" against the ECE or any other treaty that may conflict with its provisions in a situation in which the IMAC concedes a right that the treaty or convention denies.

conflicts, has always explicitly legislated treaties and conventions into domestic (municipal) law, by special acts of Parliament.[37]

Treaties and conventions, therefore, with regard to the position of the individual, have equal status with domestic law. There is a valid argument, that whatever conflict might arise must be resolved in favor of the suspect or the convict. Consequently, the State might be held liable for damages sustained by an individual in cases where the authorities disregard the more favorable clause, be it in the treaty or in the domestic law. This applies, of course, only if the governmental decision is reversed by the Court (upon appeal or any other legal remedy provided for in the law). Most countries, therefore, will leave the final decision on extradition to the courts, and, thereby, avoid potential damage suits. This will apply equally to all judicial assistance affecting the rights of individuals. Hence, the government can only improve an individual's situation vis-à-vis a judicial decision.[38]

III. JURISDICTION AND PROCEDURE

There is disagreement among countries as to whether the judicial or the executive branch of a State should have the final decision on extradition. Generally, there are three different systems, which will be referred to as: the restrictive system, the facultative system and the Swiss judicial system. These systems may of course vary also among themselves because control over the whole extradition procedure is a matter of domestic (municipal) law.[39]

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37. *See infra* PART ONE § II, *A & B.*

38. United States-Switzerland Extradition Treaty of 1900, *supra* note 26; ECE, *supra* note 4. *See supra* note 26 for the citations to all treaties as ratified and enacted. Domestic law makes the State liable to the treaty's partners to adhere to the treaty, because the treaty itself has become domestic law. Thus, indirectly, individual rights may be involved.

39. The ECE permits the prosecution of a suspect for offenses committed before his surrender, other than the offense for which he is extradited, subject to the consent of the requested State. ECE, *supra* note 4, art. 14. This might have serious results as discussed in detail *infra*, PART TWO § I, *B*, and is, in fact, subject to petitions for reform of the Convention in that respect. *See, e.g.*, TRADITIONAL EXTRADITION LAW, *supra* note 8, at 46.

A very important problem under Swiss law is the protection of the third party, which, of course, might be irrelevant for an extradition procedure but is essential in matters of judicial assistance. Article 10, paragraph 1 of the IMAC provides that information is to be granted only if it appears imperative to establish the facts and only if the seriousness of the offense would justify it. The Court has held that disclosure of a crime is admissible information. *See In re* Gutzniler, BG (unpubl.) (Jan. 11, 1984). No third person, who has a power of attorney or is counsel to a suspect, can claim the status of a "non-involved individual third person in order to receive protection from disclosure, *see In re* Banque de Scandinavie, BG (unpubl.) (Feb. 8, 1984), neither can an intermediary in a business transaction for the suspect claim the privilege. *See In re* Banque Keyser

A. The Restrictive System

Most Western European countries practice what could be characterized as a restrictive system of extradition. Upon appeal by an individual, these countries bring the case before the court of venue, and if that court refuses extradition, the government is bound by that decision. If the court grants extradition, however, the government is still free to deny it according to political expediency.[40]

B. The Facultative System

The second system is referred to as "facultative." In France, the court, upon an appeal by an individual, will issue an "opinion" which does not bind the government in any way. According to Anglo-Saxon practice, including that in the United States, the court will also rule in the first instance, but the Secretary of State, representing the executive branch is bound by a denial. The Secretary of State can refuse extradition, however, even if the Court has granted it.[41]

Ullman, BG (unpubl.) (Sept. 5, 1984). Likewise, there is no protection for the spouse of an account holder. *See In re* Acampora Megrelli, BG (unpubl.) (Sept. 18, 1984); *In re* Geiger Bechter, BG (unpubl.) (Nov. 28, 1984). The suspect is never entitled to request protection for the third person. All he may do is inform the third person of his potential involvement. *See In re* Schulte, BG (unpubl.) (Nov. 7, 1984).

A third person is deemed to be involved, and hence cannot claim protection under the IMAC, if there is a direct relationship between him and the offense for which assistance has been requested. *See In re* Jean Leon Steinhauslin et Banque Pictet, BG (unpubl.) (Oct. 31, 1984) referring to *In re* Raytheon, BG 105 I b 429 (1979). In a recent decision, the Court has allowed authorities free discretionary power to examine the involvement of a third person in order to determine the applicability of protection under the IMAC. *See In re* Tirnovali, BG (unpubl.) (June 5, 1985).

A wrong decision by the police authorities as to the involvement of a third person is to be treated as any other mistake by the government or its institutions. Switzerland has codified a statute regarding state liability toward the individual entitled the Federal Act Concerning the Responsibility of the Confederation and its Officials. Bundesgesetz über die Verantwortung des Bundes und seiner Behoerdenmitglieder, RS 170.32 (1958). This law is based on article 117 of the Constitution and covers members of Parliament, the legal authority, employees of the government and all government officials, excluding the military. The government is liable for damages sustained by any individual, irrespective of guilt; *id.*, art. 3, but if an official is found guilty nonpecuniary damages can be awarded, including moral damages. The Swiss Federal Court has jurisdiction over damage claims. The act establishes criminal liability for officials committing offenses abroad, if the offense is one enumerated by the Swiss Government in its reservations to the ECE. *Id.* art 16. If the Government must pay damages to an individual it may, thereafter, seek indemnification from the responsible official. This legislation is clearly one of the great achievements in the protection of individual rights against the state.

40. SCHULTZ, *supra* note 6, at 221; P. FELCHIN, DAS POLITISCHE DELIKT 253 (1979).

41. *See* C.P.P., art. 661. In Italy, the competent executive authority is the Minister of Justice, but a final court ruling is required. *Id. See also* Netherlands Extradition Act of

C. *The Swiss Judicial System*

Finally, the Swiss system, upon appeal by an individual, leaves the final decision to the Court. The executive branch, the Office of Police at the federal level or the Cantons are bound by the judiciary's decision. For political offenses, the government is bound to pass on the matter, ex officio, to the Supreme Federal Court, whose decision is final.[42]

1. Switzerland as the Requesting State

The extradition request is to be initiated by the competent prosecuting authority—which, in almost all cases is the Canton. Article 343 of the Swiss Penal Code provides that prosecutions for all offenses not specifically within the jurisdiction of the Federal authorities is a matter for Cantonal competence. Federal authorities prosecute only a few offenses, such as crimes involving explosives.[43] The execution of

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1875, Stb. No. 39 (1967), art. 8, paras. 2 & 14-15. German Extradition Act of 1929, art. 26, 1933, BGBl I 618.

42. Under the French Extradition Act of 1927: "*[L]e juge d'extradition ne doit pas perdre de vue qu'il n'est pas maitre de l'opportunite de la decision . . . . Le Gouvernement conserve a cet egard un pouvoir de l'appreciation plus large que le juge . . . .* " Loi relatif á l'extradition des estrangers, art. 4, para. 1, 1968 Bulletin législatif Dalloz [BLD] 194. Under the terms of the British Extradition Act of 1870:

> A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded is one of a political character (a), or if he proves to the satisfaction of the police magistrate or the Court before whom he is brought on habeus corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character. . . .

24 & 33 Vict., ch 52, sec. 3(1).

However, "[i]f the Secretary of State is of the opinion that the offense is one of a political character, he may . . . at any time order a fugitive criminal . . . convicted of such offense to be discharged from custody." *Id.* sec. 7.

Thus, the Secretary of State can overrule notwithstanding the nonappealability of the probable cause ruling. Simultaneously, the question of right and the question of fact are being decided by two separate authorities, judicial and executive. A recent note, *Political Offense Exception*, 5 FORDHAM INT'L L.J. 565 (1982), discusses, in great depth and with great incite, the interpretation of the statute and the treaty, which led to the negative decision in *In re* Mackin, No. 80 Cr. Misc. (S.D.N.Y.), *habeas corpus denied*, 668 F.2d 122 (2d Cir. 1981), in which the question of whether the court should make a determination on the political nature of the crime was raised, and the court concluded that the political offense exception was within the scope of the extradition hearing. *Id.* at 42-43. The government had argued that the statute granted the court jurisdiction only to determine the existence of probable cause. *Id.* at 36. The political character of the offense was found to be irrelevant as to whether the evidence sustains the charge. *Id.*

43. The IMAC provides that "[t]he Federal Office [which is part of the Department of Justice] shall render the decision on extradition." IMAC, *supra* note 1, art. 55, para. 1:

sentences is also exclusively Cantonal business, but the Federal Office of Police is more than a mere forwarding authority. The Office of Police will examine the request for formal correctness, the motive, the description of the suspect, the facts, the warrant of arrest (or the judgment) and the qualification of the offense according to the Swiss Code.[44] It will also assure that requests to Anglo-Saxon countries, because of the probable cause examination at the other end, contain a statement of evidence of guilt.[45]

2. Switzerland as the Requested State

In the case of requests emanating from signatories of treaties and the ECE, the above rules apply *mutatis mutandis*. There is, however, no documentation of any evidence of guilt requested by Anglo-Saxon countries, and, moreover, the IMAC applies to all requests coming from countries with whom Switzerland has no treaties. Because, under Swiss law, procedure is an exclusive matter of the requested State, Swiss authorities may also apply the rules of the IMAC vis-à-vis treaty partners, unless such rules would conflict with such treaties.[46]

If IMAC rules are violated, the suspect may object. The requesting

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> If the person pursued claims to be charged with a political offense, or if the investigation reveals serious reasons to believe that the offense is of a political nature, the Federal [Supreme] Court shall decide the case. The Federal Office shall send the file to the Court with its proposal. The person pursued shall be given the opportunity to take position.

Id. art 55, para. 2. The government is bound by whatever the Court decides. Thus, decisions on the political character of an offense is a matter pertaining to the law only. Note that in non-political matters, the Swiss Federal Supreme Court takes the case on appeal and in political matters, the government is responsible for presenting the case to the Federal Supreme Court.

44. Most conventions and treaties demand only these basic documents. *See, e.g.*, ECE, *supra* note 4, art. 12. If an act is committed abroad that comes under Swiss jurisdiction, it must be specified as such.

45. By treaty, a judge's signature certified by Bundleskanzlei, and a certified copy of the corresponding article in the Swiss code is required. *See* United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art V.(2); Great Britain-Switzerland Extradition Treaty of 1880, *supra* note 26, art VI A. England further requires a statement as to the punishability in Great Britain, *id.*, art. VI A. If judgment has been rendered, a certified copy of the sentence is required. *Id.* Judgment in absentia is not recognized. *Id.*, art. V C. For passing the probable clause examination, all Anglo-Saxon laws require certified copies of depositions or other evidence upon the basis of which the warrant was issued, an accurate statement of the offense charged with an indication of time and place of commission, and accurate evidence necessary to establish the identity of the person. United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. V. For Provisional Detention, a sworn complaint must be presented. *Id.* art. VI.

46. The Federal Office selects appropriate procedure, ECE, *supra* note 4, art. 16, and makes decisions on provisional measures. *Id.*; IMAC, *supra* note 1, arts. 44-45.

State, however, may not.[47] Article 17 of the IMAC provides that the Federal Office shall receive requests from abroad and initiate examination by the competent Cantonal authorities, unless "compliance with the request is obviously inadmissible."[48] The Cantonal authorities will examine exceptions and most restrictions, either *ex officio* or upon the objections raised by the individual.[49] There are some special obligations imposed by treaties on the examination of the request,[50] which can be expressed by the following maxim: Don't let a request fail for mere reasons of formality; lack of formality can be healed.[51]

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47. *See In re* Gelli; BG 109 I b 223 (1983), wherein the Court assumed discretionary power to order the detention of a suspect, in as much as it can assert this power "whenever circumstances permit." In so holding, the Court disregarded article 5(1) of the European Human Rights Convention. BGBl 1952 II 685, BGBl 1956 II 1879. The *Gelli* decision, although contestable, is consistent with prior determinations by the Court. *See In re* Carzon, BG (unpubl.) (Oct. 6, 1981); *In re* Bartolai, BG (unpubl.) (Nov. 7, 1975).

Provisional arrest is the rule, not the exception. IMAC, *supra* note 1, art 44. Hence, there is no right to be released unless special circumstances are shown. *See In re* Cuevas Capeda, BG (unpubl.) (Oct. 15, 1985). The request for an arrest must clearly state an offense; it is not sufficient that the foreign authority simply state that the suspect is a member of a criminal group. *See In re* Yasar Kisacik, BG (unpubl.) (Oct. 11, 1985). The burden of showing an improper arrest is on the suspect. *See* Capeda BG (unpubl.) (Oct. 15, 1985). A request must be specified within 40 days, otherwise the suspect will be released. *See In re* DeCarli, BG (unpubl.) (Oct. 22, 1985). Provisional arrest is not counted toward the jail sentence. *See In re* Riggio, BG (unpubl.) (Oct. 17, 1985). This is because of the principle of comity on which the IMAC is based. ECE signatories and treaty partners may object to procedural faults. *See, e.g.*, ECE, *supra* note 4, art. 22.

48. IMAC, *supra* note 1, art. 17. A mistake or incomplete information can be remedied at any time. There is no res judicata in administrative matters, as in extradition or judicial assistance. *See, e.g., In re* Santa Fe, BG (unpubl.) (Nov. 30, 1983) (following the well-known decision of *In re* Santa Fe, BG 109 I b 47 (1983), concerning insider trading and not a violation of business secrets under STGB art. 162). The possibility of correcting a mistake is recognized in *In re* Schulte, BG (unpubl.) (Nov. 7, 1984). The examination of the default is only superficial.

49. A suspect is entitled to be represented by an attorney of his choice or otherwise by officially appointed counsel without fees paid by the suspect. *See In re* Chatelain, BG 107 I b 80 (1981); *see also* SCHULTZ, *supra* note 6, at 161-67. There may be no examination of the suspect without a hearing by a judge or an official of the Political Department (Swiss State Department).

Although there are no Miranda-type obligations in Switzerland, article 22 of the IMAC compels the authority to notify the suspect of his legal remedies. If such notice is not given, however, the resulting decision is not invalid, unless the suspect can show a disadvantage. *See In re* Banque des Depots et des Gestions, BG (unpubl.) (Mar. 7, 1984). Concerning the obligation to appoint ex officio counsel, *see In re* Ursino, BG (unpubl.) (Mar. 21, 1984).

50. If admissible, treaties provide for possible corrections and time for additional information. *See, e.g.*, Great Britain-Switzerland Extradition Treaty of 1880, *supra* note 26 art. V(7).

51. Article XI of the United States-Italy Extradition Treaty, *supra* note 4, permits

3. Form of Request

Article 12 of the ECE requires that written request be communicated through diplomatic channels. Other means of communication, however, may be arranged bilaterally.[52] The IMAC also requires a written request containing the identification of the individual, a summary of relevant facts, the text of regulations applicable to the place and time of commission, and a legal qualification, in one of the three official languages (German, French or Italian). This last requirement could pose a problem when the request eminates from a country whose language is less well-known.[53]

4. Costs

The ECE, the IMAC and all treaties, except the extradition treaty between Switzerland and the United States, stipulate that all costs are to be borne by the requested State.

5. Provisional Arrest Pending Request

The ECE permits provisional arrest in article 16. However, the necessary documents—warrant, details of offense, legal qualification and details on the individual—must follow within eighteen days. The IMAC follows this rule in article 44.[54]

6. Postponed Surrender

Article 58 of the IMAC allows a postponement of extradition if the wanted person is being prosecuted in Switzerland for other offenses, or if he is serving a jail sentence. Article 19 of the ECE also follows this

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incomplete documentation in a request to be remedied within a reasonable time specified by the requested State. If the requested information is not thereafter provided, the suspect will be released. *See also id.* art. XII.

According to Swiss practice, even a provisional arrest is not affected by a temporary lack of information. *See In re* Stephani, BG 32 I 317 (1906). The proposition is quite contestable. Provisional arrest, however, is the rule, *see* IMAC, *supra* note 1, art. 28, para. 6; *In re* Chebbah, BG (unpubl.) (Mar. 24, 1984), and is usual in extradition procedure. *See* IMAC, *supra* note 1, art. 47, which provides prerequisites under article 2 of the IMAC. Freedom on bail is seldom allowed unless the suspect is unable to bear the deprivation of liberty. *See In re* Baskaya, BG 109 IV 159 (1983). The exceptions under article 47 of the IMAC are cumulative—both must be shown—one is insufficient. *See In re* Ciolini, BG 109 I b 58 (1983).

52. Telegraphic communications may be used in cases of urgency or direct communications from one Ministry of Justice to another.

53. A translation of the IMAC has not been certified in any unofficial language.

54. The IMAC includes provisions for liability and for false arrest. IMAC, *supra* note 1, art. 15.

rule. The IMAC, however, permits Swiss authorities to "get rid" of such an offender, if the requesting State guarantees his return.[55] In the case of the notorious terrorist Petra Krause, however, Italy never fulfilled its guarantee to return. At the time of this writing, Petra Krause is still free, notwithstanding the ECE and the IMAC.

PART TWO — LIMITATIONS TO EXTRADITION

I. RESTRICTIONS

Apart from the basic prerequisites for extraditing an individual to another jurisdiction, there are a great number of internationally recognized restrictions adopted in most countries which adhere to a system of international law. Some of these restrictions have been controversial, while others are commonly accepted. Some examples of controversial restrictions are the differing interpretations of the "*non bis in idem*" rule, the prescription of an offense (as opposed to dual criminality), the evaluation of *absentia* judgments, the problem of extraterritoriality (and universality) in certain jurisdictions, and the problem a government faces in extraditing its own citizens. Other restrictions are generally accepted by international consensus: the rule of speciality; the question of surrender to a third country by the requesting nation; the objection to capital punishment and special (extraordinary) courts; and the political offense privilege. These latter noncontroversial rules have been laid down in the form of a Resolution by the Madrid International Lawyers' Conference of September 28, 1973,[56] and must be considered when examining requests for extradition. These rules do not exclude extradition but rather restrict it, so as to protect the fundamental rights of the individual suspect.

A. Non Bis in Idem

The rule of *non bis in idem* (literally "not twice for the same"), sometimes erroneously characterized as a procedural matter, restricts extradition when the individual in question claims to have already been prosecuted for the same offense for which extradition is now being sought, and, moreover, has been acquitted or convicted, and served his sentence. This rule is generally accepted by most treaties and domestic laws,[57] although some countries may distinguish between prose-

55. IMAC, *supra* note 1, art. 58, para. 2.

56. *See* 13 J.O. COMM. EUR. (No. L 44) 703 (1972).

57. The ECE considers this principle in two contexts. The first, ius cogens, precludes surrender if final judgment has been passed in the requested State. The second permits

cution, acquittal or conviction in the requested, the requesting, or a third State.[58] The corresponding rule under Anglo-Saxon law, includ-

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the denial of extradition if the authorities in the requested State have decided not to institute or to terminate proceedings in respect to the same offense. ECE, *supra* note 4, art. 9. The ECE does not address the application of res judicata vis-à-vis proceedings in the requesting State or a third State.

Because extradition is considered an administrative proceeding and not a criminal matter, there is no absolute rule that requests for surrender cannot be granted because that very same request had previously been denied. In other words, res judicata does not exist in extradition matters. In Panamex v. Canton of Zurich, BG 109 I b 160 (1983), the Supreme Court denied the "*portée de foree de chose jugée des decisions*" which allows previous mistakes in the request to be remedied at a later date by complete information. This confirmed the decision in *Schmidt*, BG 107 I b 78 (1981). *See In re* Bohm, BG 108 I b 296 (1982) concerning the *non bis in idem* privilege arising out of res judicata in a third country.

Note that a specific provision in the ECE, *supra* note 4, art. 8, enables a denial of extradition, whereas another provision explicitly excludes extradition, thus protecting the individual. *Id.* art. 9. Concerning a stipulation tending to perforate the protection provided by the *non bis in idem* rule, see SCHULTZ, *supra* note 6, at 18.

Austria excludes extradition. Bundesgesetz über Auslieferung und Reehtshilfe in Strafsachen, paras. 9(3) & 16(3), 1979 BGBl 529. *Accord* Deutsches Rechtshilfe Gesetz, para. 9, 1982 BGBl 2071. This is similar to article 51 of the IMAC, which permits an exception in case of a new trial-"review" according to article 229 of the Bundesgesetz Strafpflege, RS 312.3.303.

58. Upon ratifying the ECE, Switzerland reserved the right to deny extradition, in derogation of article 9 of the ECE, if such refusal has been motivated by a proceeding in a third State. Swiss Reservations to the ECE, art. 9, 1967 BBl .033. On the other hand, Switzerland expressed a willingness to grant extradition if the request showed new facts of evidence justifying review of the case. *Id.* The IMAC is more precise; the request shall not be granted (ius cogens) if acquittal, discontinuation or conviction has taken place in Switzerland or elsewhere (e.g., the place of commission of the act). IMAC, *supra* note 1, art. 5. It follows then that Switzerland may grant extradition if judgment has been rendered in a third country only—*i.e.*, neither at the place of commission of the crime, nor in Switzerland. For example, a Nazi having committed crimes in Poland but acquitted in Germany may be surrendered to Poland upon being found in Switzerland. The status similar to acquittal is accorded to discontinuation for material—not personal—reasons or renunciation, or provisionally abstaining from the imposition of a sentence. *Id.* art. 5, para 1(a). The case of conviction refers only to actually having served the sentence by the wanted person. *Id.* art. 5, para. 1(b). The IMAC permits the re-opening of a case in the sense of article 229 of the Swiss Penal Code or cantonal statutes, respectively. *Id.* art. 5, para. 2.

Apparently the reservation made to article 9 of the ECE influenced the members of the competent Council of Europe Committee to amend the ECE by an additional protocol, Europ. T.S. No. 86, opened for signature October 15, 1975, which under chapter II, article 2 supplemented the somewhat ambiguous article 9 of the ECE. The additional protocol states, in brief, that no extradition (ius cogens) of a person shall be allowed against whom final judgment has been rendered in a third State, in case of acquittal, enforced judgment, pardon or conviction without the imposition of a prison sentence. *Id.* A very controversial exception, contained in paragraph 3, allowed signatories to facultatively grant extradition if, in the discretion of the requested State and irrespective of the

ing United States law is the doctrine of double jeopardy.[59]

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right of the individual, it was determined that the offense for which the sentence was imposed, was committed against an individual, an institution or anything having public status in the requesting State; if the person upon whom sentence was passed had public status in the requesting State; or if the offense was completed wholly or partially in the territory of the requesting State. *Id.* para. 3. Upon ratifying this protocol, a further reservation was made by a number of signatories regarding the potential discriminatory treatment of public status offenders or victims in violation of the principle of equality before the law. Note that Switzerland, too, has not signed this protocol, because privilege or discrimination respectively of a "public status" victim or offender appears contestable (and possibly against ordre publique).

59. The coverage of double jeopardy under the fifth amendment of the United States Constitution differs from *non bis in idem* in that double jeopardy extends to the same offense rather than to a single given act. The "same offense" is not involved in successive prosecutions if the law underlying each prosecution "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 303-04 (1932).

The difference in legal concepts between Anglo-Saxon and Roman law arose in Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980). In that case, the defendant argued against extradition because of *non bis in idem*, whereas the Government representing Italy, showed that there was no "same offense identity" between the two statutes. *Id.* at 172. The question is whether the same act had already been the object of a criminal proceeding in either the requested or, for that matter, a third country. In other words, the previous proceedings need not have been in Italy but may just as well have taken place in Switzerland. In *Sindona*, the court ruled in favor of the Government because the effect of the crime in Italy appeared to be of a different nature than the one reflected under United States law. *Id.* at 179. Hence, there would be no double prosecution if the wanted suspect were to be surrendered to Italy, notwithstanding the apparent violation of the *non bis in idem* rule.

As there is no good reason to assume that upon surrender the suspect would not have a fair trial in Italy with a good defense of res judicata conforming to the Italian code, nothing had been done to his detriment by surrendering him. There appears no doubt however, that in a reversed case, (i.e. on an extradition request by the United States against a suspect found in continental Europe) the European courts would deny extradition, and the United States Government could not establish a good case that the principle of double jeopardy is not applicable. It would probably fail on the firm application of the *non bis in idem* rule in Europe. Although not falling under the same title, the application of article 8 of the ECE leads practically to the same result, if the competent judicial authorities of the requested State are proceeding or intend to proceed against the suspect for the offense or in the request. This *pendente lite* restriction is self-understood, and is, therefore, not referred to in the extradition law.

The differing view of the Swiss and the Americans with regard to the rule of *non bis in idem* is clearly reflected in *In re* Veronica Nelson, BG 110 I b 185 (1984). The rule is not specifically mentioned in the United States-Switzerland Mutual Assistance Treaty, 1977 BBl I 17, but it is a rule inherent under Swiss law with or without a treaty. The rule is limited, however, to the Swiss reservation to article 9 of the ECE or article 5 of the IMAC. The reason for the reservation and the stipulation in the IMAC is that the requesting State should not have the right to request the surrender of a person whom that requesting State cannot prosecute under its own law. If the United States, for instance, were to initiate a new trial, because of the differing concepts of *non bis in idem* and double jeopardy, its request must show that it could legally do so. Only if the United

B. Specialty

Because a request for extradition and the granting of such a request constitute a contract between two States, regardless of whether it is based upon a commitment or comity, and any condition made under that contract must be adhered to. This is the legal basis for the most important restriction on extradition, which is referred to as the rule of specialty. No treaty or domestic law has failed to adopt this rule.[60] The rule provides that the trial in the requesting country, upon the surrender of the wanted person, is admissible only as to the offense for which the request has been made.[61] The person surrendered always has the

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States could legally bring the new case in accordance with United States law would Switzerland extradite, even if a new trial would not be permissible under Swiss law. Thus, irrespective of the strict Swiss rule, extradition would be granted on the basis of United States law.

Concerning the application of the *non bis in idem* rule, see United States-Italy Extradition Treaty of 1983, *supra* note 4, art. VI, and the Swiss Reservations to the ECE, art. 4(1)(b), 1967 BBl 319.

Discharge of the extradited person is considered final if the situation in the requesting State enables the suspect to move about freely without violating the conditions of his custody or other guidelines set down by the competent authority, or if he can leave the country freely without restriction. The problem of *non bis in idem* ceases after the expiration of the stipulated period.

60. The doctrine of the contract is not universally accepted. *See* T. VOGLER, AUSLIEFERUNG UND GRUNDGESETZ 34 (1964); DAHM, *supra* note 9, ULLMAN, VÖLKERRECHT 12 (1898); SCHULTZ, *supra* note 6, at 12 (Schultz does not fully accept the doctrine). It may be argued that, irrespective of contract, the rule is international in scope. German theory held that it was, so that even if a relevant treaty is silent on the subject, an accused party could not be prosecuted for an offense for which he was not extradited. The United States Supreme Court in United States v. Rauscher, 119 U.S. 407 (1886) arrived at the same result not by invoking international law but rather by the "weight of authority and just sound principle." *Id.* at 430.

61. ECE, *supra* note 4, art. 14; United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. 19; IMAC, *supra* note 1, arts. 6 & 9. The United States-Switzerland Treaty permits the extension of the trial to other offenses only upon consent of the individual. The treaty explicitly states that it would not recognize such an extension, "unless the individual to be surrendered expressly consented to [the extension] in open court, which consent shall be entered in the record." United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. 6. This rule is known as the "absolute specialty" rule, which, apart from being an element of Anglo-Saxon law, *see* British Extradition Act of 1870, 33 & 34 Vict. ch. 52, § 3.2, is also found in the German, Norwegian and Swedish extradition laws. Deutschse Rechtshilfe, para. 11, Gesetz 1982 BGBl 2071; Norwegian Extradition Law of 1908, *supra* note 9, para. 5; Swedish Extradition Law of 1913, *supra* note 9, para. 11. Contrary to this "absolute specialty" rule, there is a "modified specialty" rule in the domestic laws of other States, such as the Netherlands and Belgium. Netherlands Extradition Act of 1875, Stb. No. 39, art. 6; Holland's extradition law, for example, allows the extension of a trial at the consent of the requested state. *Id.* The Swiss IMAC has also adhered to this "modified specialty" rule. It says that "the state to which a person has been extradited, may, upon a new request, be permitted to prosecute

right to invoke the rule of speciality. The rule in Switzerland is that

other offenses." IMAC, *supra* note 1, art. 39. The Swiss legislature probably had in mind that an individual ought to be heard by the Swiss authorities, before it would recognize a new request. There exists some doubt, however, as to whether or not the requesting State should return the individual to Swiss territory for a hearing of this kind, and the IMAC does not address this point. The ECE specifies that the extradited individual may not be prosecuted, sentenced or detained for any offense that was committed prior to his surrender, other than the one for which he was extradited, unless the requested state consents (and the consent was given when the offense was itself subject to extradition in accordance with the provisions of ECE); or when the extradited individual, having had the opportunity to leave the territory to which he had been surrendered, has not done so within 45 days of his final discharge; or the individual has returned to that territory after leaving it. ECE, *supra* note 4, art. 14. Switzerland ratified the ECE with the reservation that "Swiss authorities were to regard discharge as final, within the meaning of Article 14, if it enabled the extradited individual to move about freely, without breaking the rules of behavior laid down by the proper authorities." Swiss Reservations to the ECE, 1967 BBl 329, art. 14, para. 1. For the Swiss authorities, an extradited individual is in all cases deemed to be able to leave the territory of a State within the meaning of the article, if he is not prevented from leaving due to an illness or some other actual restriction of his freedom. It may be argued that this reservation (which has precedence over the IMAC with respect to relations between Switzerland and the co-signatories of the ECE) requires an additional hearing by competent judicial authorities in Switzerland. The result of this hearing, for all practical purposes, would be the return of the suspect to Swiss territory, where he would be free from being pressured by the authorities of the requesting State. A test case of this kind has not yet arisen.

A solution to the problem might have been the simple requirement of the consent of the suspect, rather than the consent of the requested state, because the rule of specialty is a basic principle under international law, and of all self-executing treaties. A violation of this rule would affect individual rights, and thus might be construed to affect the Swiss national interest in accordance with article 2 of the IMAC, which allows for the denial of judicial assistance. That the application of speciality rules are ex officio conditions to extradition is not controversial per se. *See* PONCET & NEYROUD, *supra* note 6, at 40-41 (referring therein to *In re* Glaser, BG 90 IV 123 (1964)); SCHULTZ, *supra* note 6, at 389; H. CHING, DU PRINCIPE DE LA SPECIALITÉ EN MATIÈRE D'EXTRADITION 12 n.107 (1950). According to international law, however, the accused can never be subject to further prosecution regardless of whether the requested state agrees. *See In re* Arietto, 7 Ann. Dig. 378 (Italy Corte Cass. 1935); Valerini v. Grandi, 8 Ann. Dig. 378 (Italy Corte Cass. 1935); *In re* Flesche, 16 Ann. Dig. 266 (Holland High Ct. 1949); Novic v. Public Prosecutor of the Canton of Basel-Stadt, 22 I.L.R. 515 (Switzerland Court of Cassation 1955).

The speciality rule might be further modified by making the offense extraditable even if there is no connection between the offense for which extradition is requested and another offense, not asserted and committed prior to the request for extradition. Thus, speciality could well be interpreted to the detriment of the suspect, and he might thereby be deprived of the rule's basic protection; the limitation of sovereignty over certain jurisdictions. *See* SCHULTZ, *supra* note 6, at 386; *see also* PONCET & NEYROUD, *supra* note 6, at 41. The protection of an individual's rights is also reduced under article 15 of the ECE, in which extradition to third countries is involved.

There also appears to be a very unsatisfactory position vis-à-vis the individual in matters in which the individual's presence is irrelevant, i.e., a prosecution in the requesting State. In other words, nothing prevents the requesting State from prosecuting the

speciality is to be applied ex officio, and to assure the strict adherence to that rule by the requesting country, all extraditions granted by Switzerland carry that particular condition, implicitly or expressly.[62]

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suspect in absentia. *See id.*, at 42 n.91a.

The modified speciality rule has been adopted in the most recent United States-Italy Extradition Treaty. *See supra* note 4, art. XVI. The treaty allows prosecution for offenses for which extradition has been requested, as well as for offenses having the same elements of fact but which constitute another offense. The documentation for the latter offense may be presented at a later date, while the suspect is in custody in accordance with article X.

The Swiss Court in *In re* Gelli, BG 109 I b 317 (1983) has insisted on a more rigid application of the rule as against the Italian practice mentioned above. *See also* Swiss Reservations to the ECE, art. 2, 1976 BBl 033, concerning discretionary extensions.

According to at least one Swiss scholar, the speciality rule must be embodied in a treaty. *See* SCHULTZ, *supra* note 6, at 370-72.

Under the French and Austrian extradition laws, no extradition may be granted for an offense not embodied in a request. *See* Loi relatif á l'extradition des etrangers, art. 7, 1968 BLD 194; Bundesgesetz über Auslieferung und Rechtshilfe in Strafsachen, paras. 23, 70, 1979 BGBl 529.

For a strict application of the speciality rule, see *In re* Glaser, BG 90 IV 123 (1964). *Contra* ECE, *supra* note 4, art. 2, para. 2, as interpreted by Message of the Federal Council. 1966 BBl I 472.

62. The question whether a condition must be expressed or is self-understood according to the principles of international law has become quite important. The rigid application of the rule means in the first place that the rule restricts the sovereignty of the requesting country in setting forth rules by which that country must abide if it wishes its request to be accepted. The French have used the precise terminology of "*l'etas limitatif de l'extradition*" which is, so to speak, part of the international treaty. Violating the rule is, therefore, a breach of contract. When there is no treaty and the requested country surrenders the wanted person without such a treaty—and only as a matter of comity—the requested country may set forth as one of the conditions of surrender the rule of speciality. At that moment an international contract is concluded, and one of the provisions stipulated in that contract is speciality. There is absolutely no reason why, then, from time to time, the requested country cannot decide whether it wishes the rule of absolute or modified speciality to govern the contract. In the first case, no extension of prosecution is possible without the freely given consent of the individual. A violation of the rule in that case is a serious matter, subject to a clear cause of action for damages sustained by the individual by virtue of that violation.

In recent years, even some American decisions have steered away from the use of the absolute speciality rule. In Fiocconi v. Attorney General of the United States, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), the court, while underlining the assurance of avoiding indiscriminate prosecution by the authorities of the requesting country, reversed the precedent of United States v. Raucher, 119 U.S. 407 (1886). The court noted that the absence of a foreign protest (Italy might have simply, if not conveniently, forgotten about it) might imply consent to an extended trial in the United States. The court assumed that such an interpretation was correct, although it amounted to a clear violation of the speciality rule. *Fiocconi*, 462 F.2d at 481.

Could Switzerland have ever implicitly consented to such an extended trial? The Swiss Court in *In re* Jaroud, BG 106 Ib 297 (1980), held that diplomatic steps against such a violation would be "in order," but it would be exaggerated to refuse future coop-

C. *Adequacy*

The principle of adequacy, generally referred to as proportionality, limits extradition to offenses that are sufficiently grave to warrant judi-

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eration because of that violation. This is, of course, a political and not a judicial decision. Nonetheless, it is sufficient to note here that the obligation to prevent a violation to the detriment of the individual is a responsibility of the Government vis-à-vis the individual. That is why consent to an extended trial, under the modified speciality rule, if it were to prevail, would make the Government liable for whatever damages the individual might sustain. The IMAC, in article 1, paragraph 2, states that "in the application of this Act, the sovereignty, security, public order or similar essential interests of Switzerland shall be taken into account." IMAC, *supra* note 1, art. 1, para. 2. That means that a violation of the conditions set forth in one international contract providing for the extradition might be construed or deemed to be to the detriment of the "interest of the country." The Mutual Assistance Treaty between the United States and Switzerland, 1977 BBl I 17, in article 37, paragraph 3, provides for a "remedy" by information to the Department of Justice which must ask the "violating State" for "an explanation". This, of course, appears insufficient if no one is held liable, only a damage suit might change the picture.

Whether a case would stand up in court, without specific legislation, is doubtful. The "steering away" of American jurisprudence from the rule of absolute speciality, apart from the decision in *Fiocconi*, 462 F.2d at 481, is apparent in United States *ex rel.* Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935), with the argument that it is in the interest of the extraditing state if the rule is established, but such an interest can be waived, implying that the accused person has no proper standing in the matter. Trying to place the matter on the plane of comity, as the Court tried to do, however, is irrelevant if we strictly adhere to the theory.

Under German law, consent can be given to prosecute another offense than that in the request. Such consent, however, must be given by a court that decides on such extension, not the non-judicial authority, German Extradition and Assistance Law, para. 11, 1982-BGBl 2071. This stipulation might be considered a compromise between the absolute and the modified speciality rule. Judicial authorities tend to withstand political pressure by the requesting country and to protect individual rights. Still, the more rigid application would underline the only real legal rational for the rule.

In combatting crime, however, even Switzerland has started to give in. *See In re Schmidt*, BG 107 I b 78, in which the terminology "accessory extradition" was used to grant authority to prosecute another second "minor" offense, which in itself was not extraditable, provided the "main offense" in the request qualified. A preceeding decision, *In re* Kroecher-Tiedemann, BG 105 I b 282 (1979) granted "accessory extradition . . . for every and each crime punishable in Switzerland, irrespective of whether [the] request had covered them."

See PONCET & NEYROUD, *supra* note 6, at 40, 66, referring to the fair trial doctrine, which states that in order to prosecute a suspect for an offense not contained in a request, a new request should be brought.

Speciality protection lasts for 30 days, after which the suspect is free to leave the requesting State. *See In re* Bogdanovic, BG 111 I b 52 (1985) (if the suspect after the imposition of sentence does not leave, the old speciality imposed by Switzerland ceases to have effect).

Recent Swiss decisions differ in their application of the speciality rule. A more rigid interpretation of the rule is applied to physical extradition, although a more liberal interpretation is applied to matters concerning judicial assistance. There is also a differing

cial cooperation on an international scale. In short, there is no extradition for minor offenses.[63]

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approach vis-à-vis the requesting State; when there is a bilateral or multilateral treaty or when no agreement exists and the system of law in that particular country is less well-known. Thus, the speciality condition is imposed on foreign authorities, but often a declaration with regard to respecting this condition is not required. *See In re* Accampora-Megrelli, BG (unpubl.) (Sept. 18, 1984); *In re* Franca Amoretti, BG (unpubl.) (Sept. 18, 1984); *In re* Banque des Depots, BG (unpubl.) (Mar. 7, 1984); *In re* I.C.C. Management Services S.A., BG (unpubl.) (Mar. 7, 1984); *In re* Gutzwiler, BG (unpubl.) (Jan. 11, 1984); *In re* Prioil-Capelini, BG 107 I b 261 (Sept. 14, 1984); *In re* Raytheon, BG 105 I b 418 (Sept. 28, 1979); *In re* Cloppenburg, BG 104 I a 49 (Jan. 25, 1978) (all requests for assistance by the United States or Western European Countries which are signatories of the ECE).

The Swiss Court has differentiated between extradition requests by Western European nations, *see, In re* Steinhauslin, BG (unpubl.) (Oct. 31, 1984); *In re* Scharbach, BG (unpubl.) (Oct. 14, 1984), the United States, *see In re* Oenzel, BG (unpubl.) (May 15, 1985); *In re* GBD Services, Inc., BG (unpubl.) (Mar. 12, 1984), and African nations. *See In re* Chamakhi Toufik, BG (unpubl.) (Oct. 3, 1984) (Swiss supervision of Tunisian respect of speciality rule). The Swiss have demanded special assurances of France. *See In re* Grenade, BG (unpubl.) (Oct. 31, 1984) (communication by requesting authority to fiscal authority in France is a grave violation of speciality). *See also In re* Tirnovali, BG (unpubl.) (June 5, 1985) (passing on information received under protection of speciality to third country constitutes violation of speciality). *But see In re* Chiaramonte & Rapaport (Ellis AG), BG (unpubl.) (Oct. 3, 1985) (when tax evasion verdict already rendered, there is no need to insist on speciality, even if the offense (insider trading) also concerned a tax violation). For examples of extradition conditions, see GUILLAUME & LEVASSEUR, LES ASPECTSD REPRESSIFS DU TERRORISME 119 (1976); SCHULTZ, *supra* note 32, at 313.

63. *See supra*, II § C. The ECE provides that offenses must be punishable with imprisonment of at least one year. ECE, *supra* note 4, art. 2, para. 1. The article also permits denial of extradition for certain offenses that otherwise meet that requirement, provided that country transmits to the Secretary General of the Council of Europe such list of excluded offenses. *Id.*, para. 4. Switzerland has instead listed all offenses extraditable. *See supra* note 22. This method conformed to the then valid Extradition Law of 1892, *supra* note 22, abrogated by IMAC. The IMAC provides that a request shall be rejected if the importance of the offense does not justify carrying out the proceedings. IMAC, *supra* note 1, Art. 4. This means that Switzerland is absolutely free vis-à-vis non-signatories, to deny extradition for whatever act it regards irrelevant, even if that act is punishable with imprisonment of more than one year. That discretion also applies for executing a sentence, whereas vis-à-vis ECE partners, Switzerland is bound by the minimum four month prison sentence provided by the ECE. ECE, *supra* note 4, art. 2.

In an additional protocol the ECE was extended to cover offenses subject to pecuniary sanctions. Article 2, paragraph 2 of the ECE states that if a request for extradition contains several separate and distinct offenses, each of which satisfies the prerequisites of dual criminality and extraditability, but one of them is punishable by less than the minimum sanctions, then the requested State could (but was not obligated to) grant extradition for the minor offenses. ECE, *supra* note 4, art. 2, para. 2. The second additional Protocol went one step further: If the minor offense was punishable only by a fine, the requested State could grant extradition. Second Protocol to ECE, *supra* note 16, art. 1. Switzerland has not signed the Second Protocol. The Swiss Supreme Court has speci-

D. *Prescription*

Extradition shall not be granted when the offender has become immune from prosecution or punishment due to a "lapse of time," according to the laws of the requesting or the requested country.[64] An amnesty or pardon will have the same effect.[65]

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fied that Swiss constitutional law permits compulsory measures only if they are proportional to the nature of the offense. *See In re* Schlumpf, BG 106 I b 260 (1980). Hence, no assistance, let alone extradition, will be granted in irrelevant cases. See *In re* Schulte, BG (unpubl.) (Nov. 7, 1984). The United States and Switzerland have adhered to the enumeration of offenses. *See* United States-Switzerland Extradition Treaty of 1900, *supra* note 26, thus implicitly waiving the requirement of adequacy. The German and Austrian extradition laws are silent on this point.

64. ECE, *supra* note 4, art. 10; United States-Switzerland Extradition Treaty of 1900 *supra* note 26, art. VIII. *See also* United States-Italy Extradition Treaty of 1973, *supra* note 4, art. VI, para. 3.

The IMAC provides that a request shall not be granted in so far as its execution requires compulsory measures, and the prosecution or execution of a sentence were barred by the statute of limitations. IMAC, *supra* note 1, art. 5, para. 1(c). Likewise, amnesty will work in favor of the wanted person.

Switzerland reserved the right to apply Swiss law with regard to prescription and prescriptability. *See* Swiss Reservations to the ECE, 1967 BBl 319. This position has been upheld by the Swiss Court in *In re* Weiskirchen, BG 107 I b 74 (1981), wherein the Court determined that Switzerland would decide these matters according to Swiss law. The Court has shown somewhat more lenient attitudes toward foreign prescription rules, *see In re* Schulte, BG (unpubl.) (Jan. 7, 1984); *In re* Gelbard, BG (unpubl.) (Feb. 20, 1985), by arguing ex contrario to article 5, paragraph 1 of the IMAC, article 35. Surprisingly, however, the Court in *In re* Bogdanovic, bg 111 I b 52 (1985), held that an examination of Yugoslavian law regarding prescriptability of an offense would not be relevant, notwithstanding article 10 of the ECE, which explicitly excludes extradition in case of prescription.

The 1983 United States-Italy Extradition Treaty, *supra* not 4, interprets prescription according to a State's own penal law. *Id.* art. VIII. A very strict prescription rule exists in the Austrian extradition law. Bundesgesetz über Auslicferung und Rechtshilfe in Strafsachen, para. 18, 1979 BGBl 529.

If a treaty is silent on the question whether a request can be barred by prescription, a problem may arise regarding the prevalence of either the statute of the requesting or the requested state. Professor Moore argues in favor of the statute of the State in which the offense was committed. *See* MOORE, *supra* note 3, at 404. This, however, would contradict the rule of double criminality. *See supra* PART ONE § I, *B.* The surrender of a suspect for an offense, which under the law of the requested State is no longer punishable, would be in conflict with the public order of that State. Therefore, the requested State will apply its own statute ex officio, while a lapse of time or amnesty in the requesting state will be a good defense and would bar extradition. The question of prescriptability of certain grave crimes is discussed *infra* PART THREE § II, *B.* Switzerland has adopted article 75 of the IMAC by amending the Penal Code, SR 311.0, to exclude the statute of limitations for certain grave crimes. Concerning the problem of double prescription, see PONCET & NEYROUD, *supra* note 6, at 25.

65. The Second Protocol to the ECE extends the right to deny extradition to the requesting State, when the requesting State has granted amnesty, but only if it could

E. *Juvenile Delinquents*

The extradition of juvenile delinquents is generally prohibited, if their surrender would endanger their mental development or their social rehabilitation. According to Swiss practice, regular criminal courts are deemed to be legally incompetent to pass judgment on such delinquincy. If a person would normally be subject to extradition, yet is under the age of eighteen, the requested country may choose instead to administer a program of social readjustment in accordance with that country's own local regulations.[66]

F. *Capital Punishment*

The requested country may generally deny extradition unless assurance is given that the death penalty will not be carried out, regardless of the sentence pronounced.[67] The same applies to corporal pun-

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have prosecuted under its own law. ECE Second Protocol, *supra* note 20, ch IV, art. 4. The requested State, for lack of jurisdiction, cannot grant amnesty for offenses committed in the requesting State. *See In re* Lazzeri, BG 87 I 195.

66. IMAC *supra* note 1, art. 33. The ECE does not provide for such special treatment, but an additional treaty supplement between Switzerland and a few other European nations, *see, e.g.*, Supplemental Agreement to the ECE, Switzerland-Germany, 1970 BBl II 197, RS. 353.916.32, permits the denial of a request and provides for the repartriation of a delinquent to his country of origin, regardless of where the commission of the act took place. The United States-Switzerland Extradition Treaty of 1900, *supra* note 26, did not consider the juvenile delinquency problem. Later, however, United States treaties have adopted similar rules. *See, e.g.*, Extradition Treaty, January 18, 1973, United States-Italy, art. III, 6 U.S.T. 493, T.I.A.S. No. 8052. The Legal Affairs Committee of the Consultive Assembly of the Council of Europe have proposed that the ECE add a protocol open for signature at an early date, permitting the denial of surrender when such an action is considered undesirable on humanitarian grounds, most notably in view of the age and state of physical and mental health of the person claimed. *See* TRADITIONAL EXTRADITION LAW, *supra* note 8, at 92.

With all due respect to the problem of social rehabilitation, the Swiss Supreme Court nevertheless has held that the interest in prosecuting an offense must prevail over considerations of social rehabilitation. *See In re* Marsman, BG 110 I b 187 (1984). This interest would also be applicable to cases involving juvenile delinquency.

67. Most signatories to the ECE have abolished the death penalty: Austria, Belgium, Cyprus, Denmark, France (just recently), Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Holland, Norway, Sweden, Israel, Liechtenstein, Finland and Switzerland. Notable exceptions are Great Britain and Turkey. As against these two countries, article 11 of the ECE would apply:

> If the offense for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offense the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

ishment or any potential sanction against the human dignity of the

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ECE, *supra* note 4, art. 11. Before the French Parliament abolished the death penalty in 1981, Switzerland, upon receiving several French requests for extradition, insisted upon a French guaranty that such a punishment would not be executed. *See In re* Ktir, BG 87 I 134 (1961) (guaranty not considered satisfactory. The judgment was later revised for lack of reciprocity); *In re* Thareau, BG 100 I a 407 (1974). Note that the strict reservation by Germany with regard to the death penalty in its ratification of the ECE had not been accepted by France prior to its abolition of the death penalty. *See* Extradition Treaty, Germany-France, Oct. 29, 1951, art. 18, 1953 BGBl II 152; *See also* 2 H. GRUETZNER, AUSLIEFERUNGSVERBOT UND ASYLRECHT 2 (1954). Upon the French ratification of the ECE, however, this point has become moot.

Switzerland has always maintained its right to either refuse extradition of suspects to countries imposing capital punishment or to surrender suspects on the condition that such penalty not be carried out. *See* Switzerland-Brazil Extradition Treaty of 1932, *supra* note 26, art. 6; Switzerland- Argentina Extradition Treaty of 1906, *supra* note 26, art. 5. *See also* Switzerland-Poland Extradition Treaty, *supra* note 26 (implicit denial is possible).

Requests by Turkey to extradite criminals have also been denied, even though both Turkey and Switzerland are signatories to the ECE, because Turkish guarantees were considered insufficient. *See In re* Sener, BG 109 I b 64 (1983). Although there is hardly a reason to assume that the criminals sought in *Sener* would have been put to death, (because business crimes, including fraudulent bankruptcy were involved) all signatories to the ECE have a right to demand an assurance on this issue and may deny surrender, particularly to a military government whose assurances are considered insufficient.

Outside the ECE, existing treaties, if any, will govern. Switzerland cannot invoke article 37, paragraph 2, of the IMAC stipulating that "[e]xtradition shall be denied if the requesting State does not guarantee that the person pursued will not be executed in the requesting State or if he will be subject to a treatment which will impair his physical integrity." IMAC, *supra* note 1, art. 37, para. 2, (because treaties take precedence over the IMAC and Switzerland may preclude by such treaty to ask for such guarantees). In more recent treaties (such as those between Switzerland and Uganda, Rwanda, Pakistan and Tanzania, *see supra* note 26), Switzerland has incorporated the death penalty provision regarding the necessary guaranty. United States treaties with Western European countries insert a similar clause, i.e., extradition shall be denied if the requesting State does not guarantee that the person pursued will not be executed in the requesting country or will be subject to a treatment liable to impair his physical integrity. *See, e.g.*, Extradition Treaty, Jan. 18, 1973, United States-Italy, art. VIII, 26 U.S.T. 493, T.I.A.S. No. 8052. When there is no treaty, Switzerland will act on the basis of article 37, paragraph 2 of the IMAC. Switzerland did, in fact, obtain such a guaranty from the United Arab Emirates, *see In re* Khetty, BG (unpubl.) (Feb. 22, 1980), and from Sri-Lanka. *See In re* Dharmajah, BG 107 I b 72 (1981). The Swiss require that the principles of the U.N. Declaration on Human Rights be assured in nations with which Switzerland has no treaty, prohibiting capital or corporal punishment, inhuman treatment or prosecution for political, extended or constructive political offenses, because all might be in conflict with Swiss public order and be deemed "procedural defects." *See* Swiss Reservations to the ECE, art. 11, 1967 BBl 319; Deutsches rechtshilfe Gesetz, para. 8, 1982 BGBl 2071; Bundesgesetz über Auslieferung und Rechtshilfe in Strafsachen, para. 12. Notwithstanding a treaty with Argentina, Switzerland-Argentina Extradition Treaty of 1906, *supra* note 26, the Swiss Supreme Federal Court, denied the extradition of five Argentine nationals for murder, extortion, kidnapping and other grave crimes. *See In re* Bufano, BG

surrendered person.

G. Special Courts

The requirement of normal judicial process, with an assurance of a fair trial for the surrendered person in the requesting country, is an important element of extradition procedure among Western nations. This means that no extradited person shall be tried by a special court. This includes summary proceedings in an ordinary court. Switzerland has gone one step further by stipulating that judicial assistance is granted, only if the individual involved can appeal to a higher judicial authority.[68]

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108 I b 408 (1982). Again, the motive behind the Court's decision is the political situation existing in Argentina at the time; a military regime is unable to guarantee that a suspect will not be executed or otherwise be subject to physical punishment. It is also worthy of note that Switzerland, in article 11 to its reservation to the ECE, may also object to corporal punishment and demand a similar guaranty as in the case of the death penalty, that corporal punishment not be carried out. ECE, *supra* note 4, art. 11. Corporal punishment is prohibited under the Swiss Constitution. BV Art. 65, II.

68. The IMAC is applicable to criminal matters when, in accordance with the law in the requesting State, an appeal to a Judge can be had. IMAC, *supra* note 1, art 1, para. 3. Extradition is conceded provided the extradited person is not brought and tried before a Special Court. *Id.*, art 38. The ECE has not established this rule. Switzerland, however, as well as a few other democracies, made reservations to the ECE asserting its right to refuse extradition unless the requesting State guarantees that judgment will be rendered by an ordinary court. Swiss Reservations to the ECE, *supra* note 16, art. 1. Turkey, on the other hand, declared upon ratification, that similar to the request for transforming capital punishment into life imprisonment, such requests for ordinary instead of summary court proceedings, will be given "favorable consideration," provided the National Assembly of the Turkish Republic will so decide. This reservation appears to be "passing the buck" on to Parliament, and to be avoiding government responsibility for not adhering to the request made by the various European cosignatories to the Convention. The United States-Switzerland Extradition Treaty excludes any extradition of suspects who will be brought before Special Courts. United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. IV. The problem for Switzerland arises again, similar to the capital punishment restriction, vis-à-vis signatories of older treaties that have not inserted the clause, in which Switzerland will be precluded from demanding assurances for trial in ordinary courts and summary proceedings. It is hard to imagine how this request would work against the U.S.S.R. or some Latin American countries. No attempt has been made thus far to renegotiate these treaties. It is noteworthy that both the United States and Switzerland have adhered to the special court restriction of the Extradition Treaty of 1900. A question has been raised whether a special court, instituted by the Constitution or by a statute to judge certain offenses, would be considered a special court in the sense of the law or the treaty. In Losembe v. FPM, BG 99 I a 547 (1973), the Swiss Supreme Federal Court ruled that such a court would not be considered a special court in the negative sense, because such an institution would be just a division of the ordinary tribunal of the country in question. Similarly, the Swiss reservations to the ECE provides that:

H. Judgments in Absentia

Judgments rendered against an offender in his absence are somewhat tainted and do not generally have the same standing as regular judgments, particularly in foreign countries.[69] Although prior treaties have not specified any such exceptions, it has been the rule in more recent agreements.[70]

> Switzerland reserves the right to refuse extradition (a) if there is a possibility that the person claimed will be brought before an extraordinary court, and if the requesting State does not give assurances deemed sufficient, that the judgment will be passed by a court which is generally empowered under the rules of judicial administration to pronounce on criminal matters; (b) if extradition is requested to carry out a sentence passed by an extraordinary court.

Swiss Reservation to the ECE, *supra* note 15, Ad. art. 1. PONCET-NEYROUD, *supra* note 6, lists special courts as follows:

> a) those established by executive—not legislative—power.
> b) those established after offense in question committed.
> c) those existing for a limited period.
> d) those established for economic policy reasons only.
> e) those established according to criteria to discriminate against certain parts of the population.
> f) those that follow a rapid [summary] proceeding.
> g) those against which there is no appeal.

Id. at 30. In *In re* Bufano-Martinez, BG 108 I b 409 (1982), the Swiss Supreme Court denied extradition because of the special court system under control of the military regime in Argentina. Likewise, in *In re* Sener, BG 109 I b 65 (1983), the Court denied extradition because of the Turkish military regime. In both cases, the requesting country's administration of justice was not trusted to apply the elementary rules of judicial procedure. Again, it is noteworthy that even though Turkey is a cosignatory of the ECE and Switzerland is obligated to follow a request by that nation, Switzerland has used its reservation to the ECE, *see supra* note 16 art. 1, to deny the request. There is no similar exclusion in the German Extradition and Assistance Law of 1982, *see supra* note 10, nor in the United States-Italian Extradition Treaty of 1983, *see supra* note 26. Austria, however, follows the Swiss example.

There are several decisions of the European Human Rights Commission that denied extradition to countries exposing suspects to inhuman treatment. *See* PONCET & NEYROUD, *supra* note 6, at 31 n.44.

The Swiss Court has required that a guaranty be given that a suspect would not be prosecuted in a special court. *See In re* Ameur Chebbah, BG (unpubl.) (Apr. 17, 1985).

69. 1 DAHM, *supra* note 9, at 163-66; D. DE VABRES, *supra* note 6, at 256. In the United States criminal contempt cases usually rest on contumacy. Therefore, the requested country will ask for information on notification of the conviction in absentia, and of the right of absent convict to reopen the case, if he is to be surrendered. *See* United States-Italy Extradition Treaty of 1983, *supra* note 4, at art. XII. In case the information requested is not forthcoming, surrender may be denied. *Cf.* Gallina v. Fraser, 177 F. Supp. 856 (D. Conn.), *aff'd* 278 F.2d 77 (2d Cir. 1959), *cert. denied*, 364 U.S. 851 (1960).

70. The IMAC provides that extradition will be denied if the convict appears to oppose execution of a judgment rendered in his absence, and this provision is no longer

I. Territoriality and Universality

It is debated in international law whether a request can be granted for offenses committed in a third country, although the offense might

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subject to appeal. IMAC, *supra* note 1, art. 96, para. C. Originally, the ECE did not contain such a provision. Upon the insistence of a few signatories, including Switzerland, however, an additional protocol was adopted at Strasbourg, France, on March 17, 1978, (and is now adhered by most signatories) which specifies under art. 3:

> When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence . . . rendered against him in absentia, the requested Party may refuse . . . if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defense recognized as due to everyone charged with a criminal offense. However, extradition shall be granted [ius cogens] if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial with safeguards as to the rights of defense. This decision will authorize the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take new proceedings against the person extradited . . . .

Second Protocol to the ECE, *supra* note 16, art. 3, para. 1. This decision will authorize the requesting party either to enforce the judgment in question, provided the convict does not oppose, or if the convict does oppose, to take proceedings against the person by prosecution as if there was no judgment. The article goes on to rule on the procedure in paragraph 2 stipulating that "when the requested Party informs the person whose extradiction has been requested, of the judgment rendered against him in absentia, the requesting Party shall not regard this as a formal notification of the judgment for the purposes of criminal procedure." *Id.* art. 3, para. 2. In fact, the judgment in absentia does not stand in case of opposition by the convict. New extradiction proceedings initiated by the requesting party are based not upon a judgment but upon asserting an offense with a view to starting a trial upon his surrender. This is a great accomplishment and a step forward to guarantee the rights of defense.

Even before Switzerland ratified the protocol in 1985, extradition was denied on the basis of a reservation declared in article 2, paragraph 1 of the ECE. The Swiss Supreme Court, for instance, held that in absentia judgments rendered in Italy required a thorough examination ex officio of the prerequisites of extradition, especially concerning the question of dual criminality of the offense. *See In re* Lazzeri, BG 87 I 195 (1961). This scrutiny, however, does not mean that absentia judgments per se are against Swiss ordre public.

When signatories of the ECE or treaty partners request extradition from Switzerland, a more lenient approach may be assumed; even more so if the foreign law permits a new trial in case of an absentia judgment. *See In re* Sadiki Sahit, BG (unpubl.) (Oct. 18, 1984).

If there is a voluntary absence by a suspect, the Swiss Court has recognized a contumacy judgment. *See In re* Bozano, BG 106 I b 403 (1980). In *Bozano* the Court asserted that absence is no reason to refuse to recognize a sentence and is no reason to deny extradition; a potential violation of foreign law cannot be examined. *Bozano* concerned the brutal murder of a Swiss girl in Genoa, Italy and the subsequent excape of her murderer to France. France expelled Bozano to Switzerland (probably incorrectly), and Italy demanded extradition based on the principle of territoriality. The Court held that because Italy is a country generally respecting the rules of a fair trial, the suspect could not

well be punishable in the requesting country. A country that, in accordance with its statute, assumes prosecution of offenses that have been committed outside its territory might not be accorded, per se, the same status with respect to its extradition request as if the offense in question had been committed within its boundaries. This exemplifies the distinction between the concepts of territoriality and universality.[71]

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object to the irregular expulsion proceedings by France. Prior to Switzerland's ratification of the Second Protocol, the Swiss Court ruled that an actual reason for denying extradition did not exist. *See In re* Broccardi, BG (unpubl.) (June 14, 1985). Therefore, because the Protocol was not yet enacted, Broccardi's extradition was granted. The suspect, however, was unlucky; shortly after this decision the Political Department announced that the Swiss Parliament had ratified the protocol, effective as of June 1, 1985. The Government had succeeded in convincing Parliament that part of the protocol was worth adopting because it provided protection for the individual against sentences passed in contumacy. With respect to the more controversial portion of the Protocol regarding fiscal offenses, however, Switzerland made a firm and unequivocal reservation.

Generally, adherence to the ECE and its protocols regarding absentia judgments facilitates extradition among signatories. In fact, the Swiss Supreme Court has decided that France, by virtue of its adherence to the ECE and the U.N. Convention on Human Rights, could be granted extradition of a suspect on the basis of an absentia judgment, prior to the ratification of either France or Switzerland of the Second Additional Protocol.

The United States-Italy Extradition Treaty of 1983, *supra* note 4, art. X(5), requires the requesting State to submit with its request a statement regarding appeals or other available remedies against absentia sentences, that are available under the law of the requesting State to the individual upon extradition.

For a thorough discussion of the comparative law regarding the execution of contumacy judgments in Switzerland, Germany, Austria, Italy and France, see DENZ, ZULÄSSIGKEIT UND UMFANG DES VERFAHRENS GEGEN ABWESENDE 58-59 (1969).

71. The United States-Switzerland Treaty of 1900, *supra* note 26, limits extradition to offenses committed in the territories of one of the contracting states. This conforms to the Anglo-Saxon rule of territoriality, *id.*, art I, but grants extradition for offenses punishable in both countries only. *Id.* art. II. According to the Swiss Penal Code, STGB arts. 4-6, the United States must extradite an offender to Switzerland, because crimes committed outside its territory are nonetheless punishable under certain conditions. Even if the act has been committed in a third country, the doctrine of territoriality is abandoned. The ECE allows the denial of extradition for offenses committed outside the territory of the requesting country, if the law of the requested party does not allow for prosecution for the same category of offenses when committed outside the latter party's territory. ECE, *supra* note 4, art. 7. ECE partners, therefore, may, but are not compelled to, request the territoriality rule of the requested country. Thus, Switzerland, under ECE, cannot obtain the same facility from its cosignatories as it can from the United States. When ratifying ECE, therefore, Switzerland also reserved the right to deny extradition requests if the crime had been committed in a third country, and that third country had previously denied extradition for the same offense. Swiss Reservations to the ECE, *supra* note 16, art. 9. This problem might be relevant to a country's extraditing of its own citizens. *See infra* PART TWO § I, *K*.

Crimes committed partly in a one country and partly in Switzerland are treated as non-extraditable because jurisdiction lies with Switzerland, irrespective of the fact that

Most European countries punish crimes committed outside their territories if certain national interests or individual personal interests have been violated by that offense. Switzerland is one of these nations.[72]

In contrast, the Anglo-Saxon practice creates a kind of "constructive presence" when an offense violates the law of the requesting State although the violation has actually been effected somewhere else. In some cases, both English and United States courts have—possibly as a compromise solution—adopted an "effect-doctrine" linking the place the act was committed with the "fugitive character" of the offender.[73]

J. Nationals

Each country has discretionary power to deny requests for extradition of its own citizens. Some countries, such as Germany, have made it part of their constitutions.[74] Italy and other European nations will

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the predominant part of the crime may have been committed outside of Switzerland. *See In re* Veraldi, BG 103 I a 616 (1977). This application of the territoriality rule was made according to the Switzerland-France Extradition Treaty of 1869, *supra* note 26, art. 12. The sale in Zurich of securities stolen in France made the offense nonextraditable. In *In re* Fiorini, BG 101 I A 592 (1975), the Swiss Supreme Court, notwithstanding the rule of territoriality, affirmed extradition when the jurisdiction of the requesting State was proved according to its domestic law. The Court, however, reversed itself in a case in which the political offense exception was plead by the accused, *see, In re* Jaroudi, BG 106 I b 297 (1980). *See also* United States-Italy Extradition Treaty of 1983, *supra* note 4, art. III, permitting the extradition of an offender alleged to have committed an offense in a third country if he happens to be a citizen of the requesting country.

72. Article 4 of the Swiss Penal Code provides in part that the code is applicable to anyone committing a crime outside Swiss territory directed against the State or the political and military security thereof. STGB, art. 4. Article 5 provides that the present code applies to crimes committed against a Swiss citizen outside the territory of Switzerland, provided the act is also punishable where it has been committed, and provided also that the offender found in Switzerland has not been extradited for that act. *Id.*, art. 5. Article 6 states that the code applies to Swiss citizens having committed a crime outside of Switzerland and thereupon been surrendered to Switzerland for the offense. *Id.* art 6.

73. *See* Gillers v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (lst Cir. 1948).

74. Grundgesetz [GG] art. 16 (W. Ger.). Paragraph 2 of article 16 of the German Constitution states: "No German may be extradited to a foreign country." That clause has sometimes resulted in the protection of war criminals. *See* N. BENTWICH, NAZI SPOLIATION AND GERMAN RESTITUTION 204 (1965). Paragraph 2 of the German Extradition and Assistance Law of 1982, *supra* note 10, states explicitly: "A foreign national can be extradited upon request for an offense asserted to have been committed abroad or for a conviction by a foreign Court." Judicial assistance, but not extradition, can be granted against a German citizen if a foreign sentence has been imposed against him for an extraditable offense, and provided that the foreign court rendering the verdict and pronouncing the sentence was acting independently. *Id.* para. 48.

Concerning the surrender of nationals generally, see PONCET & NEYROUD, *supra* note 6, at 40.

grant the extradition of their own nationals, if so stipulated in treaties or multilateral conventions.[75] Anglo-Saxon legal concepts on the other hand, are entirely different. This is due to different ideas on territoriality and the alleged moral claim of a citizen to be judged by his own peers.[76] Upon the insistence of European states, however, both Great Britain and the United States have been compelled to insert the restriction in most of their treaties.[77]

Article 6 of the ECE, *supra* note 4, obligates the requested state to prosecute the suspect at the request of the requesting state if the suspect is not extradited.

75. *Italy*-Article 9 of the Italian Penal Code authorizes Italy to try an Italian citizen for the crimes he committed abroad and for which extradition is requested. C.P. art. 9. The Italian Government has the option to either surrender or prosecute. In fact, notwithstanding its treaty with the United States, which did not mention the right to deny extradition of its citizens, Italy has always refused such extradition. *See* Refuse, *The Extradition of Nationals*, 24 ILLINOIS STUDIES, THE SOCIAL STUDIES (1939).

France-According to the French Law on Extradition, *supra* note 42, art. 3(1), citizens are not extradited, but can be prosecuted in France. *See* Code d'Instruction Criminelle, 1878 J.O. 5255. Originally, even French proteges, such as alien national residents of France were protected against extradition. *See* Refuse, *supra*, at 86.

Holland - The law imposes no obligation to extradite, but might indicate the option to do so. *See id.*, at 85.

Austria - Paragraph 12 of the Austrian Extradition and Assistance act of 1979, *supra* note 57, prohibits the extradition of Austrian citizens.

76. Whether a justified claim so exists among countries of a similar system of law is debatable. The British concept that a criminal should be tried in the place where the act was committed is derived from one of the basic tenets of Anglo-Saxon law. *See* REFUSE, *supra* note 75, at 25.

There is an "optional clause" theory which holds that, a bilateral treaty should not be affected by the municipal law concerning the extradition of a citizen. *See id.* at 32. Another doctrine is the "discretionary power" rule, which makes extradition—even in treaties—a matter of comity. The British have frequently demurred against this concept, however, because it was in conflict with the rule of reciprocity. The British Extradition Act of 1870, *supra* note 14, in fact, does not mention the nondelivery of nationals. It was frequently argued that there was an advantage in getting rid of the "rascals." Hence, although treaties authorize Britain to deny the extradition of its nationals, they also allow discretion. *See* Switzerland-Great Britain Extradition Treaty of 1880, *supra* note 26, art. 3. This claim is justified only when the requesting country has a totally different legal system, owing to immaturity (Third World) or to a totalitarian (or authoritarian) rule. When criminal systems are comparable and enjoy mutual confidence, this claim appears unjustified. The Swiss Constitution establishes that Swiss citizens and residents have a right to be heard, even in civil cases, by the judge having jurisdiction on territorial basis. B. VERF. art. 59 (Switz.). The Swiss law on personal jurisdiction holds that territoriality is not dispositive in and of itself; a suspect may be tried wherever he is found. This rule is derived from the refusal to extradite. *See* Refuse, *supra* note 75, at 134.

77. The United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. I, provides that there is no obligation to prosecute. Article III of the United States-Italy Extradition Treaty of 1983, *supra* note 4, allows the requested State to extradite a suspect for an offense committed outside the requested State only if the offense is punisha-

The question arises whether, upon denial of extradition because of citizenship, the offender may go free or whether he must be prosecuted at home. The maxim "*aut dedere, aut judicare*" is an accepted rule in most European codes, but it is not adhered to in grants of asylum.[78] Switzerland makes extradition of Swiss nationals dependent upon the consent of the individual concerned,[79] and reservations made by Switzerland, upon the ratification of the ECE, follow that rule. In this respect, therefore, international agreements will not prevail over the domestic law.[80]

It is important to note that the Legal Affairs Committee of the Consultative Assembly collaborated with legal experts, among them the Swiss penalist, Professor H. Schultz, in June 1969. At this meeting the participants discussed the problems raised upon implementation of the ECE by various signatories and other members invited to adhere to the ECE. One of the problems analyzed was the position of resident aliens who sought to have the same standing as citizens have when attempting to avoid extradition. The Assembly's decision to afford "rooted residents" the same status as citizens, was due to the large number of foreign workers employed by the European economy and the large number of employees who reside in the country of their employment (about ten million workers at the time of that discussion); even though they are not "rooted" in the sense of having the same background and cultural standards as the citizens of the country of

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ble there—which is consistent with the rule of dual criminality—or if the suspect is a citizen of the requesting State. In other words, a United States citizen who commits a crime in a third country can be extradited by Italy to the United States irrespective of whether the suspected crime is punishable in Italy. The signatory to the treaty thus assumes jurisdiction over its subjects, notwithstanding the fact that the offense was committed elsewhere.

78. Asylum is granted, save for political terrorists, under certain conditions set forth in recent international conventions and the pertinent domestic laws. *See infra* PART THREE § II, *D.* Switzerland must prosecute an offender if it refuses to surrender him. *See* STGB, arts. 3-7.

79. IMAC, *supra* note 1, art. 7 para. 1. An exception is provided for the return of a citizen temporarily surrendered by a third country to Switzerland, for trial at home. *Id.* at art. 7(2).

80. Swiss Reservations to the ECE, *supra* note 16, art. 6. This reservation concerns acts committed outside Swiss territory which are prosecuted in accordance with STGB, arts. 5 & 6, and the Federal law on State responsibility, art. 16, RS. 170.32, and the laws prohibiting terrorist acts committed on board Swiss aircraft, RS. 747.30 or vessels. RS. 748.0. It is interesting to note that a Swiss national who instigates a crime to be committed abroad can be prosecuted abroad upon a request by the appropriate foreign authority because the principal crime was committed abroad. In other words, Switzerland should not assume jurisdiction because of the instigation, but it could do so in the discretion of the courts. *See In re* Lenzlinger, BG 104 IV 77 (1978).

their employment.[81]

There was likewise an extended discussion on applying the principle "*aut dedere aut punire*" to nationals. Until the conflict between territoriality and universality is reconciled in the domestic codes, however, the request to punish a citizen only when he is surrendered makes no sense for countries that cannot prosecute acts committed outside their territorial boundaries.[82] Moreover, a society cannot realize its goal of punishing criminals, if fugitives are granted sanctuary in any country which does not voluntarily surrender criminal offenders.[83]

K. Re-Extradition to Third Countries

This issue arises when the requesting country, upon receiving the suspect, may itself be in possession of a request from a third country petitioning for the extradition of the individual for the same or another act committed. Although no law forces the requesting country to inform the requested country of the third country's petition, it is an established rule that the requesting country cannot, under any circumstances, re-extradite the individual without either the consent of the requested (and surrendering) country or the individual himself.

Europe and the United States differ on this point. The United States-Switzerland treaty is quite specific; the consent of the individual is essential, and that consent must be given voluntarily and under no trace of force or duress. In addition, only when the individual in question has been at liberty for a period of at least one month following his final release to leave the territory of the requesting country, and he has failed to make use of such liberty, does the requested country cease to be interested.[84] The ECE, in contrast, requires only the consent of the requested State, not the individual himself. It also requires the production of new documents on the alleged crime by the requesting State.[85]

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81. The Dutch Government has included "rooted" aliens. *See* Duk, *Principles Underlying the European Convention on Extradition*, in LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES 27, 32-36 1970). Switzerland has recently followed the Dutch approach by refusing to surrender a "rooted alien" who had been domiciled in Switzerland for a considerable period of time, had his family there, and his children in Swiss schools. See *In re* Pasca, BG (unpubl.) (Nov. 15, 1984).

82. Concerning the United States and the Scandanavian countries, *see supra* note 61 and accompanying text.

83. *See* United States-Switzerland Extradition Treaty of 1900, *supra* note 26. This is a permissive clause and there is no obligation to deny extradition.

84. The United States-Switzerland Extradition Treaty of 1900, *supra* note 26, states that having committed an offense elsewhere, should leave the requesting country to qualify in this respect. *Id.*, art. IX(2).

85. ECE, *supra* note 4, art. 15. The rule does not provide proper protection for the

The IMAC reflects a much simpler rule. Re-extradition is prohibited for offenses committed prior to the offense for which extradition is sought. This rule, however, becomes void forty-five days after the discharge of the accused in the requesting country.[86] In accord with its position on the extension of trial (against the speciality rule), Switzerland assures the ability of the accused to move around freely and leave the requesting country at will when the requested country's consent is given. A new hearing is probably also contemplated because Swiss legal concepts require it.[87]

L. Conflicting Requests

Legal theories in the United States tend to recognize the discretionary denial of extradition in a case in which two different treaty signatories present petitions for the surrender of the same person. The requested State, in this case, could honor one of the petitions based upon the seriousness of the offense, the place where the crime was committed, the offender's nationality, the sequence of the requests and, of course, the provisions of the treaty.[88] If the petitions were

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accused, because there is nothing to prevent the authorities of the requesting state to which the offender has been surrendered, to ask for the consent of the requesting country which might give the consent at its discretion. That State may, but is not required to, request production of documents set forth under the consideration of the normal and original request. *Id.* art. 12. In fact, there is an attempt in the ECE to apply the speciality rule to reextradition. *Id.* art. 14. The ECE allows for a lapse of 45 days after final discharge of the offender in the requesting country. But, even though the speciality rule prohibits extradition for offenses not mentioned in the petition, the reextradition permit may delay extradition requests only until production of documents (copy of conviction or statement of offense). *Id.*, arts. 14 & 15. Article XVI, paragraph 2 of the United States-Italy Extradition Treaty of 1983, *supra* note 4, prohibits the extradition of a suspect to a third country without the consent of the requested state, not the individual. The extradited individual can be surrendered to a third country if he leaves the requesting State freely and thereafter freely returns; or if the suspect is free to leave the requesting State but does not do so for 30 days. In either event, the consent of the requested State need not be obtained.

86. "The pursued may be extradited on condition that the requested State shall . . . not reextradite him to a third State for any offense committed prior to his extradition." IMAC, *supra* note 1, art. 38. These rules do not apply after 45 days. *Id.*

87. A restriction on the power to consent, was recommended by the Legal Affairs Committee of the Council of Europe. *See supra* PART TWO § I.

88. *See* United States-Italy Extradition Treaty of 1983, *supra* note 4, art. IX.

The Swiss Court has held that when there are several requests under articles 17-19 of the ECE and article 40, paragraph 2 of the IMAC concerning different crimes in various countries, the requesting State may surrender the suspect to a third nation. *See In re* Giovanni Torasso, BG (unpubl.) (Aug. 6, 1984).

According to article XV of the United States-Italy Extradition Treaty of 1983, *supra* note 4, in the event of multiple requests for extradition of a suspect by more than one

based upon an identical offense, the exercise of discretionary power would be more complicated. The United States-Switzerland treaty resolves conflicting requests, based on the gravity of the crime, and, consequently, affords preference to the State whose request is based upon the more serious offense, unless other treaties provide otherwise. In cases of equal gravity, the first petition submitted prevails.[89]

Europeans grant the requested State less discretion. The ECE sets forth the considerations of the relative seriousness of the offense, the place of the commission, the date of the request and citizenship. It also opens the door to a subsequent re-extradition.[90]

Switzerland has enacted a more specific rule. The IMAC also distinguishes between requests for the same offense and different offenses—not unlike the United States rules. The place of commission will be determinative in the case of requests for the same offense, irrespective of whether jurisdiction may also lie with the other State under the principle of universality. Only where there are more and different offenses will the decision be made according to the seriousness, the chronological order of the requests, the nationality, the better prospect for social rehabilitation and the possibility of extradition to another, fourth State.[91]

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state, the decision is at the discretion of the requested State, according to the place of the offense, the gravity and the sequence of the requests.

The French Extradition Law, *supra* note 42, art. 6, states the relevant factors to be considered, including the interest of the requesting state, its priority and the gravity of the offense. The decision is at France's discretion.

89. United States-Switzerland Extradition Treaty of 1900, *supra* note 26, art. XI.

90. ECE, *supra* note 4, art. 17. The convention does not make a distinction between a request for the same and for different offenses. *Id.* This may in fact be irrelevant because the degree of seriousness is solely determined by the requested State, in case the individual is sought by two countries for two different acts.

91. The IMAC provides:

> 1. If several States request extradition for the same offence, extradition shall be granted as a rule to the State where the offence was committed or principally perpetrated.
>
> 2. If extradition is requested by more than one State for different offences, the decision shall be made having due regard to all circumstances, especially the seriousness of the offences, the place of commission, the chronological order in which the requests were received, the nationality of the person pursued, the better prospect of social rehabilitation and the posibility of extradition to another State.

IMAC, *supra* note 1, art. 40. In Jaroudi v. FPM, 106 I b 297, 298 (1980), the Swiss Supreme Court denied extradition of the accused to Lebanon, although the offense had been committed there. Instead, the Court granted extradition to France where only one, less relevant act had been committed. The Court accepted the French definition of political offense—reciprocity on the legal qualification—implying also that France would rather adhere to the condition of non-re-extradition, be it to Lebanon or to a fourth

II. EXCEPTIONS

Apart from the restrictions on extradition already discussed, there are three exceptions generally recognized as valid reasons to deny requests for international cooperation. These are the fiscal, military and political offense exceptions.

A. Fiscal Offenses

Fiscal offenses have almost universally been excluded from extradition and, until recently, from any judicial assistance. The reasons remain as obvious as ever; there is not the slightest interest on the part of one country to assist another country in the collection of contributions from its citizens. Such contributions may or may not be justified—it is simply not the requested country's business. Economic interdependence and international collaboration in combatting business delinquency has changed the legal climate with regard to fiscal duties toward tax avoidance or evasion arising out of tax shelters and other methods of withholding contributions. Whether, under these circumstances, it can be argued that fiscal privileges in matters concerning mutual international assistance are on their way out, however, is more a political question than a legal one. Because prior treaties and municipal laws, which enumerated extraditable offenses, avoided the issue of tax evasion, the question whether extradition could be requested at all was never raised.[92] More recent treaties and laws, however, had to exclude them expressly, if that was intended. The newest treaties and most recent municipal laws simply ignore the fiscal exception, and,

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country, even if that fourth country claimed the individual concerned. *See In re* Donadoni, BG 103 I a 624 (1977) (article 17 of the ECE is a guideline only; the decision is up to the discretion of the Swiss).

92. The United States-Switzerland Mutual Assistance Treaty of 1973 specifically excludes extradition when the alleged violations concern fiscal offenses. United States-Switzerland Mutual Assistance Treaty of 1973, *supra* note 59, art. 2(5). *See also In re* Grandi, BG 60 I 216 (1934); *In re* Buzzi, BG 57 I 284 (1934); *In re* Estinger, BG 39 I 228 (1913). A "relative" fiscal offense, one committed in connection with a common crime, is unknown in Switzerland. *See* JURISPRUDENCE DES AUTORITÉS ADMINASTRATIVES DE LA CONFÉDERATION 143 (1932). Extradition could be granted under the specialty rule for the common crime. *See In re* Redjoff, BG 79 I 34 (1953). The Mutual Assistance Treaty does grant judicial assistance, but not extradition, in tax matters involving organized crime. United States-Switzerland Mutual Assistance Treaty of 1973, *supra* note 59, art. 2. Likewise, it does not apply to cartel and antitrust matters, *id.* art. 2(1)(C)(4), or violations of customs, taxes, duties, etc. *Id.* art. 2(1)(c)(5). Assistance shall be granted, however, if the request concerns an investigation or proceeding involving one of the offenses enumerated above if the offense was allegedly committed in furtherance of the purposes of organized criminal activity. The United States-Switzerland Extradition Treaty of 1900, *supra* note 26, does not apply to fiscal crimes at all.

thus, imply that at least mutual assistance can be granted for such offenses.[93]

Although the ECE originally had excluded extradition for fiscal offenses (unless there was a special bilateral agreement), the ECE replaced the original exclusion contained in article 5 with an additional Protocol of March 17, 1978, which obligates the signatories, for the first time in history, to grant extradition for all such fiscal offenses if the offense corresponds to an offense of the same nature in the requested country. In other words, if the offense is punishable in both countries, extradition is granted. In addition, even if the same kind of taxes are not imposed in both countries, including securities exchange restrictions, extradition shall be granted.[94]

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93. Article 5 of the ECE, *supra* note 4, permits extradition for offenses concerning taxes, duties, customs or exchange only if the contracting parties have agreed with respect to that offense. The ECE, in effect, invited its signators to conclude bilateral (or multilateral) agreements among themselves. The ECE could do no more in this respect, if a large number of countries with different economic systems and concepts was going to adhere to it. *See* ECE, *supra* note 4, art. 28.

94. Article 2 of the Second Additional Protocol to the ECE reads:

> Fiscal Offenses:
>
> 1. For offenses in connection with taxes, duties, customs, and exchange, extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention, if the offense, under the law of the requesting Party, corresponds to an offense of the same nature.
>
> 2. Extradition shall not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs, or exchange regulation of the same kind as the law of the requesting Party.

Second Additional Protocol to the ECE, *supra* note 16, art. 2. A signatory of that Protocol would therefore be compelled to extradite an individual for a violation of an exchange regulation, notwithstanding the fact that such regulation existed in the requested country which has subscribed—as have most Common Market partners—to the free flow of capital. Thus far, only a few ECE signatories have ratified this Protocol, and those that have reserved the right not to extradite for fiscal matters.

Regarding municipal law, note that the German Extradition and Assistance Law of 1982 does not exclude extradition for fiscal offenses; *contra*, Austrian Extradition and Assistance Act of 1979, *supra* note 57, para. 15(2) does explicitly exclude all fiscal matters. Austria has not enacted a stipulation similar to article 3, paragraph 3 of the IMAC, *supra* note 1, for judicial assistance in a case of fiscal fraud.

Swiss business and banking circles have been under the impression, conveyed by article 3, paragraph 3 of the IMAC, that, although not mandatory, judicial assistance may be granted on requests from countries with very high or confiscatory taxes that discriminate against mobile property. In a very recent decision, however, the Swiss Supreme Court ruled that Switzerland would be obligated to grant assistance when fiscal fraud against a foreign country occurred. *In re* Interclean Trading-Ziegler, A 317/85 (Nov. 27, 1985).

In *Interclean*, a German importer of certain parts, apparently through a Swiss affiliate had obtained goods at higher prices than were really billed by the Spanish manufac-

Because the Protocol is fairly recent, the limits of its application are not yet known. It stands to reason, however, that the limits will remain in full force, and that each fiscal offense must qualify under the double punishability principle. Moreover, the offense need not be punishable by deprivation of liberty because pecuniary sanctions are

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turer—through the Swiss affiliate. Thus, a certain part of the payment made by the German importer allegedly remained in Switzerland and was not really paid for the goods shipped by the Spanish company. Although it could not be established that the money thus earned by the Swiss company really belonged to the Germans, suspicion for a fiscal fraud maneuver remained, and, in fact, the books of the affiliate which might have proved the case remained blocked and seized according to the IMAC. In June 1985, the Swiss Parliament was persuaded by a sudden wave of "willingness to demonstrate collaboration" on the part of an overanxious Federal Council to ratify the Protocol with the reservation, but without agreeing to grant judicial assistance for fiscal matters. In fact, the German prosecuting authorities were asked to submit further proof regarding the ownership of the monies that were derived from the transaction for the Swiss company. Germany, however, had no right to demand assistance. An additional protocol, Europ. T.S. 99, covering fiscal matters was not yet ratified by Switzerland, and thus the only legal rationale for assistance in fiscal matters remained the IMAC, which is supposed to be a voluntary assistance act. Such an interpretation appear appears erroneous, however, because the Supreme Court held that Article 3, paragraph 3, of the IMAC—although stating "can" (and not must) should not be interpreted in such a way as to leave it to the discretion of the Swiss authorities whether assistance may or may not be granted. Such discretionary powers would lead to insecurity. In internal guidelines established by the Swiss Government, Finanz (Fi) 2000.1, states:

> If the subject of the foreign proceedings is an offense which would be regarded in Switzerland as a duty or tax fraud, assistance may be granted. As a duty or tax fraud is considered any offense punishable under Art. 14(2) of the Administrative Penal Law (SR 313.0). On the other hand, a foreign request may not be refused solely on the ground that Swiss law does not know the same duties or taxes or fiscal regulations (Art. 24, para. 2 FD above). A foreign request which has been made in the context of proceedings for fraud in connection with the Value Added Tax—unknown to Switzerland—may therefore not be rejected on the grounds that in Switzerland there is only a sales tax.
>
> The granting of assistance in the cases of duty or tax fraud is subject to the condition that the description of the matter under investigation leaves no doubt that the elements of that offense under Swiss law are given. In particular, it should be evident that there is the element of malice, for example because the offender used false documents or induced another person to give false confirmations or make false statements in his favor . . . .

Id. at 16.

The interpretation of the law is such as to practically confer in cases including the breach of bank secrecy, if they can prove that taxes have been evaded by methods of false documents, fictitious entities or both, created for the purpose of withholding a tax or a part thereof to the foreign government. Even a "confiscatory" tax as had been imposed by the Socialists in France on mobile property of certain values could thus qualify. The Swiss and international community are still looking for guidance as to limits of such assistance.

sufficient.[95]

As far as Switzerland is concerned, the IMAC denies any extradition for any kind of fiscal offense.[96] With all due respect to international judicial assistance, it is hardly likely in the foreseeable future that Switzerland will yield to pressure from its European Convention partners because Switzerland remains committed to the free flow of capital. In light of this policy, offenses such as common fraud and forgery, if related to tax fraud or currency restriction violations, will probably not be subject to extradition. The same holds true for false declaration vis-à-vis customs, untrue invoicing and any other maneuvers intended to evade taxes or exchange controls, as long as the only victim is the foreign government.[97]

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95. Article 2 of the ECE has not been modified by the Additional Protocol. It ought to follow that tax violations, exchange violations or both, must be quite severe to qualify as extraditable offenses under the Protocol. Apart from the basic prerequisite of dual criminality, the restrictions regarding adequacy (proportionality), speciality, special courts—i.e., neither summary proceedings, nor arbitrary decrees by the Financial Administration or by the Revenue Service nor judgments in absentia—will still prevail. It follows that administrative penalties will not be extraditable.

96. The only reference to fiscal crimes states that "[a] request [for assistance] shall not be granted if the . . . offense . . . appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade or economic policy. A request, however, for judicial assistance under part 3 of this act [thus excluding extradition] may be granted [for] tax fraud." IMAC, *supra* note 1, art. 3, para. 3.

Note that the German Extradition and Assistance Law of 1982 does not exclude fiscal offenses from extradition, it only enumerates a privilege for military and political offenses. *See supra* note 10, paras. 6-7. Even the United States-Italy Extradition Treaty does not mention the fiscal offense exception, and excludes only military and political crimes from extradition. *See supra* note 4, art. V(3).

When a fiscal crime and common crime might be connected, Swiss jurisprudence tends to limit assistance (and extradition) to the speciality clause only. The IMAC states that the prevailing offense will determine the assistance—and extradition—*supra* note 1, art. 6, and speciality will always be imposed as a condition. Swiss Reservations to the ECE, *supra* note 16. *See* Cauchie v. Geneva, BG 107 I 264 (1981); Prioil-Campellini v. Grisms, BG 107 I 261 (1981).

The determination as to what constitutes a fiscal as opposed to a common offense is entirely at the discretion of the Swiss authorities. *See In re* Acampora, BG (unpubl.) (Sept. 18, 1984). "Fiscal" means a debt owed to the State for taxes, duties, customs, etc. A debt owed to a state institution, for example a hospital, is not fiscal. Thus, the Court has held that a physician who withheld part of his income from his services that he was bound to pass on to the state hospital—a matter punishable in both Germany and Switzerland—committed a common and not a fiscal offense. *See In re* Klumper, BG (unpubl.) (Sept. 23, 1985), in which evidence furnished by Switzerland to a foreign authority concerning a common offense also revealed a fiscal crime, judicial assistance was still granted by Switzerland because it expressed trust that the foreign state subscribes to a system of law and would respect the speciality rule. *See In re* Schlumpf, BG 106 I b 260 (1980).

97. Swiss jurisprudence follows the rule "*lex specialis derogat legi generali*".This

B. *Military Offenses*

Except in wars among allies, military offenses will not be subject to extradition. The United States-Switzerland treaty did not specifically exclude these offenses among its enumerated extraditable offenses nor did it mention the violation of an obligation to perform military service or any other act against the military strength of the requesting country. Although the ECE excluded offenses under military law, it stated that only those military offenses that are not offenses under ordinary criminal law are to be excluded.[98] The IMAC is more specific. It defines "military offense" as the refusal to perform military duty or similar service or acts directed against the defense of the State requesting extradition.[99]

C. *Political Offenses*

The most important and unanimously recognized exception to extradition is the defense that the offense is of a political character. The

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rule stands for the proposition that if a tax fraud contains elements of common fraud, the offender will be prosecuted for the tax fraud only. *See* A v. Canton of St. Gallen, BG 101 IV 53 (1975). The intent of the accused is relevant (subjective theory), so if a false document aims at reducing taxes there will be no prosecution for forgery. *See* B v. Grisons, BG 106 IV 39 (1980). One may think of applying this rule mutatis mutandis to a connex act of fiscal fraud and exchange violation in favor of the foreign offender whose purpose it is to protect his capital. In *In re* Nesti, BG 92 I 285 (1966), the Court held that a connex crime of a fiscal and common nature, in one and the same act, is not extraditable. Prior to the enactment of the IMAC, the Court held that concurrent fiscal and common crimes were not extraditable. *See In re* Cicchelero, BG 103 I a 218 (1977); *See also In re* Gaessler, BG (unpubl.) (July 4, 1962).

98. The ECE permits signatories to enter into agreements and to surrender military offenders among themselves. No such agreement presently exists. A deserter who had committed another crime in order to desert (forged documents, for instance) will probably not be extradited. *See infra* PART THREE § I, *B* & *C* for an analogous application. The German Extradition and Assistance Law of 1982, *supra* note 10, para. 7, follows the IMAC in that respect. The Austrian Extradition and Assistance Act of 1979, *supra* note 57, para. 15(1) does as well, but differentiates between purely military and mixed military matters, when common crimes are committed by military personnel.

99. Switzerland could surrender a strictly military offender as defined by Article 3 of the IMAC if he had committed at the same time a common crime, even during military service, because of the predominance of the common crime. Professor Hans Schultz distinguishes between these two categories of military offenses, but gives no definite answer, as to extraditability. TRADITIONAL EXTRADITION LAWS, *supra* note 8, at 17. European laws make no distinction when extradition is granted for another offense; the specialty rule demands exclusion of any military part thereto. *See In re* De Cock, BG 53 I 319 (1927); *In re* Canredon, BG 26 I 90 (1906). The United States-Italy Extradition Treaty of 1983, *supra* note 4, art. V(3) explicitly excludes military offenses, which are not considered common crimes. *Contra In re* Ktir, BG 87 I 134 (1961); *In re* De Cock, BG 53 I 319 (1927).

political offense is privileged in most treaties, conventions and domestic laws.[100] The definition of "political offense" is left to the requested country. This is the easiest and least complicated way out of the difficulty in agreeing to define the term. The inability to extradite the political offender is therefore a rule of domestic law (municipal law in the English terminology). It follows that the accused, upon surrender, cannot raise the defense in the court of the requesting State that as a political offender the court lacks jurisdiction over him.[101] Interdepen-

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100. *See, e.g.*, U.N. International Bill of Human Rights, art. 14, G.A.Res 217 III, U.N. Doc A/810, at 74 (1948); United States-Switzerland Treaty of 1900, *supra* note 26, art. VII; ECE, *supra* note 4, art. 3(1). IMAC, *supra* note 1, art. 3, para. 1. *See also* German Extradition Act of 1929, *supra* note 10, art. 3; C.P. art. 8 (Italy).

Concerning political crimes, see United States-Italy Extradition Treaty of 1983, *supra* note 4, art. V(1).

The French Extradition Law precludes extradition for crimes of a political character or with a political aim, *supra* note 42, art. 5, para. 2, but if the offense is committed during an insurrection against the State, the acts must not be barbarous, odious or of a radical-like character so as to destroy the political privilege.

101. *See Personal Jurisdiction: Extradiction and Asylum*, in DOCTRINE OF INTERNATIONAL PUBLIC LAW 729 (O'Connor ed. 1972). The extension of the definition of "political offense" to include "reason to believe that extradition requests have been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion," has been adopted by the ECE, *supra* note 4, art. 3(2). The IMAC distinguishes between "political offenses," IMAC, *supra* note 1, art. 3, and the "procedural defects." *Id.*, art. 2, para. b. The IMAC states that the "request for assistance shall not be granted if there are reasons to believe that the foreign proceedings are carried out so as to prosecute or punish a person on account of political opinion, social group, race, religion or nationality . . . ." *Id.* A recently published article in a leading Ticino newspaper by the brilliant and eminent District Attorney Paolo Bernasconi on "New Humanitarian Tasks for Swiss Courts" sets forth the legal prerequisites in what appears to the author as the first commentary to this new law: that the Swiss Court must henceforth examine ex officio the three prerequisites, to wit:

> a) That the foreign proceedings correspond to the European convention on human rights;
>
> b) That they do not tend to prosecute, punish or *aggravate the position* of the suspect because of his political opinion, or his belonging to a certain social group, race, religion or nationality; and
>
> c) That they don't show any other serious deficiencies.

Corriere del Ticino, Feb. 19, 1983. (emphasis in original).

What the IMAC in article 55, paragraph 2 considers an obvious defect, *see supra* note 1, is really the typical case of the extended political offense, as we may call it, which gives Switzerland as the requested State, the right to deny extradition.

A potential persecution or discrimination of a suspect upon extradition caused the Court to deny extradition to Turkey. *See In re* Sener, BG 10 I b 65 (1983); *In re* Bagci, BG 108 I b 301 (1982) (both suspects being Turks of Curdish origin). In both cases it was successfully argued that the suspects belonged to an ethnic minority that was persecuted in Turkey and subject to discriminatory practices by Turkish authorities. Hence, surrender would possibly have been in conflict with the prerequisites for extradition. *See* PART Two § I, F & G. Because article 3, paragraph 2 of the ECE authorized Swiss denial of

dence among nations, however, will require a more synchronized approach. The next section will deal with the theoretical underpinnings of the political offense exception, the modern reasons for conceding that privileged status and the limitations imposed upon that status.

PART THREE — THE POLITICAL OFFENSE EXCEPTION

I. THEORIES

A. Historical Aspects

The term "political offense" (*delît politique*) derives from the ideas of the French Revolution and its liberalistic aftermath. Prior to that era, political offenses, although not termed as such, were crimes *de lèse majesté* and were normally punished by death under the pretense of *raison d'état*. Offenders had to be returned to the territory of the commission of their acts. The French Revolution in its "Declaration of Human Rights" speaks of "offenses committed for better causes" and eliminates the practice of punishment without law. France, since the beginning of the last century, has refused to entertain demands for extradition of political offenders. The treaty with Switzerland of July 9, 1869, for instance, contained such a clause, notwithstanding the then prevailing system of enumeration.[102]

In the nineteenth century, various schools and doctrines developed in international public law justifying the status of political crime,[103]

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extradition, the Court's decisions could not be questioned. Such was not the case in *In re* Bufano-Martinez, BG 108 I b 409 (1982), a case in which the Court denied extradition to Argentina of kidnappers who sought to collect their ransom money in Geneva. In *Bufano*, the application of the ECE probably conflicted with the Switzerland-Argentina Extradition Treaty of 1906, *supra* note 26, and because treaties take precedence over the IMAC, *supra* note 1, arts. 2-3, the decision is highly contestable. The ECE is of no concern whatsoever to Argentina.

Instead of denying extradition, it might have been more appropriate for the Court to exact a guaranty from Argentina to prosecute surrendered persons according to the principles of the European Human Rights Convention, BGBl 1952 II 685, BGBl 1956 II 1879, and get an assurance that the suspects would have a "fair trial." *See In re* Panamex, BG 109 I b 175 (1983); *In re* Chebbah, BG (unpubl.) (Apr. 17, 1986) (special guaranties given by Tunesia, which assured treatment compatible with human rights conventions and in accordance with article 37, paragraph 2 of the IMAC). For a similar provision to that contained in the IMAC, see German Extradition and Assistance Law of 1982, *supra* note 10, para. 6. *See also* British Extradition Act of 1870, *supra* note 14, § 3(1) (enacted 100 years earlier).

102. Switzerland-France Extradition Treaty of 1869, *supra* note 26.

103. The neo-classical school follows the theories of the famous French jurist Francois Guizot, who had a great influence on the codification of penal laws in Europe. In his volume, FRANÇOIS GUIZOT, DES CONSPIRATIONS ET DE LA JUSTICE POLITIQUE (1821), he ar-

but definitions have varied ever since that time.[104] Interpretation has depended more upon ideology than on law. It is, therefore, quite safe to say: "*Omnis definitio periculosa*" ("*all definitions are dangerous*").

B. Absolute and Relative Offenses

The political offense exception distinguishes between absolute and relative offenses. An absolute offense is an act aimed directly at the State or its institutional functions. It also could be directed at certain individual institutions, like unions or multinational organizations as long as they enjoy a certain status within the State. Moreover, the act need not overthrow the existing order, but rather it need only modify it by reform.[105]

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gued that a political crime is a crime of circumstance, and circumstances can change. Later, toward the end of the century, the internationally known Enrico Ferri established the "positivistic doctrine;" arguing for the privilege of political crime upon sociological views, justifying it because it was a positive result of social conditions. Oppression was ignored by Ferri, but many other scholars applied the "positive reaction" to such oppression, dominating nineteenth century Europe. *See generally* THE POSITIVE SCHOOL OF CRIMINOLOGY: THREE LECTURES BY ENRICO FERRI (S. Grupp ed. 1968) and E. FERRI, LA ESCUELA CRIMINO LOGICA POSITIVISTA (1890).

104. The term "political" refers primarily to the form of the state authority within the human society and distinguishes between the general individualistic or collectivistic approach, or between the "perpetual power struggle" as defined by the great philosopher Max Weber. M. WEBER, *Politik als Beruf*, in GESAMMELTE POLITISCHE SCHRIFTEN 397, (1921). Weber taught the doctrine of modern liberalism as a perpetual power struggle between the individual and the State. A later definition, taught by the Collectivists in the Fascist-Nazi era, tended to emphasize the struggle between "good and bad" or between "friend and enemy." Its principal legal protagonist was Carl Schmitt. *See* C. SCHMITT, BEGRIFF DES POLITISCHEN 7, 16 (1933). More recent German jurists redefined "political" in connection with "crime" as an attack against the State and its authority, or in other words, its government, its institutions, and its very functions, including its constitutional and policing authority, the established civil and human rights, and its relations with other States. See Gruetzner, *Auslieferungsverbot und Asylrecht*, in 2 DIE GRUNDRECHTE 604 (Neumann, Nipperdey & Scheuner eds. 1954). The doctrine which had its codified basis already in the old German Extradition Law of 1929, *supra* note 10, para. 3, was delineated by Mettgenberg, DEUTSCHES AUSLIEFERUNGSGESETZ 232 (2d ed. 1953) and Gruetzner *supra*.

The German theory was called "objective" because it did not require any thought by the offender that his act was meant, even in his mind, for the betterment of society. Thus, the intent was irrelevant, as long as an attack took place against the State. The interpretation of the law, in fact, rests on an extension or a restriction of that basic delineation. In other words, is the formal (objective) interpretation that fits the facts to the elements of the crime, more decisive than the motivation?

105. The absolute political crime is based upon an objective approach in that it does not take into consideration the motivation of the offender. Absolute political offenses are privileged and thus cannot invoke extradition. The oldest Swiss cases follow that rule. *See In re* Jaffe, 27 BG I 67 (1901); *In re* Camporini, 50 BG I 299 (1924).

The relative offense on the other hand, is an absolute offense combined with a common one, having the same aim. The relative offense might be committed by one and the same act (complex) or by separate acts (connex).[106]

In both categories of offenses there is a political aspect and a common crime element. In the case of a single act, the well-established rule is that predominance will decide. As the IMAC stipulates: "a request shall not be granted if the subject of the proceeding is an act which, according to the Swiss concept, has predominantly political character."[107] The question is not that easily decided in the case of several acts. In this situation, the concept of separation has long been adhered to, which meant that each act would be considered separately and extradition might thus be granted for the common crime. This is against the idea of the relative offense, and, therefore, the "predominance theory" prevails.[108]

A relevant factor to be considered is whether a common crime, although thought to be necessary to effectuate the political crime in the mind of the offender, is realistically capable of achieving its aim. Swiss

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106. Killing a policeman at the beginning of a rebellion would be one act (complex). Setting fire to a department store and taking the manager hostage to extort funds for the rebellion would compromise several acts (connex). Depriving the train's driver and passengers of their liberty and extorting funds to release the hostages one act (complex). Threatening during negotiations with the government to shoot hostages or actually shooting one of them would comprise two acts (connex.).

107. IMAC, *supra* note 1, art. 3, para. 1.

108. Hans Schultz has criticized the separation concept in the case of connex acts, because it would follow that the requested State would grant extradition for the common crime though under the condition that prosecution for the political part be prohibited. *See* SCHULTZ, *supra* note 6. One must consider the fact that frequently, the common crime has been necessary in order to commit the political one, so that, in the final analysis, the question of preponderance will be raised. According to the German Extradition Act of 1929, *supra* note 10, any connex is sufficient and consequently, predominance is irrelevant, provided that there is a political crime that had followed the one that was targeted. *Id.* art. 3(1). The Swiss Supreme Federal Court in *In re* Jaffei, BG 27 I 52, 63 (1901), considering a typical complex crime, denied extradition because the political act was predominant. In *In re* Belenzow, BGI 538 (1906), the Court granted extradition, separating the common crime from the political act. Concerning more recent decisions involving political or common crimes in either the complex or connex form, see *In re* Kroger, bg 92 I 108 (1966) (predominance of common crime established, *accord In re* Ockert, BG 59 I 136 (1933), *contra In re* Koster, BG 19 I 130 (1893) (a predominantly political crime). The Supreme Court, in *In re* Gelli, BG 109 I b 317 (1983), held that the suspect had committed a predominantly nonpolitical and hence extraditable offense, not by virtue of his membership in a criminal organization (which is not punishable in Switzerland) but by his role in the fraudulent bankruptcy of Banco Ambrosiano in Milan, Italy. The Court determined the latter offense to be predominant. The speciality rule governs, however, and Gelli can never be prosecuted in Italy for his activity in the criminal organization.

jurisprudence tends to demand the potential success of the political offense for extradition to be denied.[109] Traditionally, the mere existence of a potential for success in the mind of the criminal was considered sufficient.

An older doctrine considered the existence of the success-potential in the mind of the criminal quite sufficient to cover the connex.[110] Now, more than that is required; blurred imagination or vague hallucinations about an immediate collapse of the attacked order upon the attack will not suffice. The political crime had to exist beyond the imagination of the criminal; that is, the term "[p]redominantly political" had to be objectively interpreted.[111] This doctrine leads us to the dis-

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109. The connex between common and political crimes can take three different forms: the common crime prepares or protects the political one (*i.e.*, stealing arms to prepare a revolt) or it could be committed together with the political crime to facilitate its execution (*e.g.*, capturing a policeman during a rebellion in order to prevent the police from protecting the existing order), or finally, the common crime could follow the political one with a view towards preventing its prosecution.

The three forms of connex are illustrated by three different decisions of the Swiss Supreme Federal Court. In *In re* Kesseleridze, BG 33 I 169 (1907), six members of the Socialist Party of Georgia-Russia robbed a bank to obtain funds for their party, assisted in financing the revolution in Russia and then fled to Geneva. Russia demanded extradition for the robbery. The request was denied because the common crime was committed to prepare the revolt. In *In re* Bamberger, BG (unpubl.) (Mar. 25, 1922), during the communist rebellion of 1921 in Germany, a revolutionary named Bamberger succeeded in disarming local police officers to keep them from preventing several commando actions against a post office, banks and the local treasury. Bamberger then fled to Zurich. Germany requested extradition for deprivation of liberty. Switzerland denied the request because the crime had been committed to prevent police from maintaining order during the revolt.

In *In re* Koester, BG 9 I 122 (1893), the German socialist Koester had committed perjury in Berlin in order to prevent the prosecution of his comrade for offending the German Emperor. The Court denied extradition for perjury because the act had been committed in order to prevent prosecution for a political crime committed by another party.

110. See SCHULZ, *supra* note 6, at 420. Swiss and most European jurisprudence has been greatly influenced by the famous lawyer and statesman Heinrich Lammasch. Lammasch's theory is that the criminal must not commit the common crime for it's own sake, but rather because he believes that the success of the common crime is required to accomplish the political crime. The common crime must prepare or materialize or abet the political crime. The political purpose must not be vague; it must be real, sensible and achievable. *See generally* H. LAMMASCH, AUSLIEFERUNGSPFLICHT UND ASYLRECHT (1887).

111. French scholars have criticized the "objective predominance" theory as too harsh and restrictive. M. TRAVERS, DROIT PENAL INTERNATIONAL, 67 (1921); M. TRAVERS, L'ENTRAIDE REPRESSIVE INTERNATIONALE, 4 (1928). Travers thought that the Swiss interpretation left the fate of the offender to the discretion of the Swiss judge.

In a few cases, such reproach appeared somewhat justified. In *In re* Ficorilli, 77 BG I 57 (1951), the Fascist company commander Ficorilli fought the Partisans during the Second World War. He did not consider the Partisans to be a legitimate fighting force, and,

tinction between objective and subjective theories of political offenses.

C. *Objective and Subjective Theories*

1. The Objective Theory

Both absolute and relative political offenses must be aimed at the functioning of the State or its institutions. This is called the objective thesis[112] because it is the object of the attack that counts, not the motivation. The principles of this theory are generally adopted in most non-Latin countries.

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as a result, upon the capture of the Partisans, he had many of them shot. One of his lieutenants deserted to the Partisans and fought with them for awhile. Believing that the War would end in a Fascist victory, however, the lieutenant came back repenitent of his "misdeeds." Ficorilli, too, had him shot. At the end of the War, Ficorilli escaped to Switzerland, and Italy demanded extradition. The Swiss Court denied extradition because the common crime of the execution of a deserter was performed in the midst of a political struggle. The purpose of the execution was political, therefore, even though the execution itself was a common offense, it had a predominantly political character. *Id.* In *In re* Nappi, 78 BG I 134 (1952), the Swiss Court granted extradition of a Neo-Fascist who had robbed the Banco di Napoli to finance an attempt to overthrough the Italian Government in 1948, long after the end of the War. It might have been imagined by the Fascist criminal that the bank robbery could, in fact, accomplish a revolution, but it was for all intents and purposes an unrelated act without any chance of accomplishing its aim. The Court reasoned that the political character of an offense was predominant, only if the offense was directly related to the political end sought. Thus, the common crime and not the poltical crime was predominant in this case.

There are three complex legal offenses in the Swiss Code that are not extraditable per se: seditious acts for a foreign state in violation of territorial sovereignty, STGB, art. 271, disturbances of interstate organizations by the defamation of a foreign government, STGB, art. 296, and disturbances of good relations with international organizations having a seat in Switzerland by defaming the character of the organization, STGB, art. 296. (All three offenses have been added to the Penal Code as modified in 1951. 1951 A.S. 1-16. Common offenses are treated in conjunction with political offenses, when, under normal circumstances, the political aspect of the offense is predominant). For an extensive and liberal application of the rule, see *In re* Kruger, BG 92 I 108 (1966); *In re* Ockert, BG 59 I 136 (1933); *In re* Camporini, BG 50 I 299 (1924); *In re* Ragni, BG 49 I 267 (1923); *In re* Koster, BG 19 I 130 (1873). And for a very rigid adherence to the political crime exclusion, see *In re* Redjoff, BG 79 I 34 (1953); *In re* Grandi, BG 60 I 216 (1934); *In re* Buzzi, BG 57 I 284 (1931); *In re* Ouchterlony, BG 39 I 228 (1913).

112. Peter Felchlin suggests that a relative offense, when a common crime has been committed to support the political one, is already "subjective," in that it compels the judge to consider what the suspect thinks and aims at. P. Felchlin, *The Political Offense*, in ZURICH STUDIES FOR CRIMINAL LAW 92-99 (1979). The Swiss have, however, classified a relative political crime as objective, if the decision on extradition is based upon the act and not upon the motivation. Thus, the political character of the victim of the attack is dispositive irrespective of what was in the mind of the criminal. *See* Dahm, *supra* note 9.

2. The Subjective Theory

The French and Italians, on the other hand, have emphasized the motives of the individual[113]—a view termed the subjective theory. This doctrine characterizes a political offense simply by the motives of the offender, that is by his "good intentions" or lack thereof. Non-selfish motives will qualify for political privilege. The problem with this doctrine is that honest motives are easily put forward and are rarely refutable. France did add the requirement of "honest political aim or purpose (not thoughts only)," [114] but even an "honest political aim" is easily invoked to serve as a pretext for ambition, hatred or envy. The doctrine is also steadily losing ground in the light of international terrorism.[115]

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113. See German Extradition Act of 1929 *supra* note 41, arts. 3-6. The Italians consider political offenses with political motivation. C.P. art. 8, Greece followed the non-Latin line, when it recently surrendered to Germany the leading member of the German terrorist scene Rolf Pohle. He had been released in exchange for the Berlin conservative politician Lorenz who had been kidnapped in a spectacular way by the Red Gang. Greece ignored Pohle's motivation. *See* 2 EUROPAISCHE GRUNDRECHTE ZEITSCHRIFT, 18 (1977). Had he gone to Italy instead, the Italian courts would have probably denied the extradition in accordance with the wording of C.P. art. 8.

114. For a defense of the French practice of denying requests to surrender fugitives for political crimes, *see* Circular of 1841 of the French Ministry of Justice, *reprinted in* E. CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 159-60 (2d ed. 1874), which states:

> *Les crimes politiques s'accomplissent dans des circonstances si difficiles a apprecier, ils naissent de passions si ardents, qui souvent sont leur excuse, que la France mantient le principe que l'extradition ne doit pas avoir lien pour fait politique. C'est une qu'elle met son honneur a soutenir. Elle a toujours refuse, depuis 1830, de pareilles extraditions; elle n'en demandera jamais.*

Id. at 160; *accord Billot*, *supra* note 27, at 102; *contra*, BURKHARDT, *supra* note 31, at 622. Some treaties with Switzerland take the doctrine (subjective theory doctrine regarding good intentions of the offender who claims political privilege) into consideration, such as Switzerland's treaty with France, *supra* note 26, art. 2, Belgium, *supra* note 26, art. 4, Yugoslavia, *supra* note 26, art. 6, Russia, *supra* note 26, art. 6. Others do not, such as England, *supra* note 26, art. 11, the United States, art. 7(1), and Brasil, *supra* note 26, art. 3.

115. In *In re* Kroeger, BG 92 I 108 (1966) the Swiss Federal Supreme Court rejected the subjective theory. The case illustrates the difference between Swiss and Italian concepts, prior to the U.N. Convention on Crimes against Humanity. In the 1960's, the former SS Leader Kroeger was standing trial before an Italian court for an extradition request by Germany for having ordered the murder of thousands of Jews in Russia. Italy denied surrender because of political motivation. When Kroeger passed through Switzerland to depart to some Latin American country, he was apprehended and, upon a request by Germany, was surrendered. The Swiss Court did not accept political motivation because the crime had not been directed against a State or at some political institution. The criminal had claimed privilege because the Jews played an important part in the Bolshevic fight against Germany. The Swiss Court, however, regarded the crimes as com-

3. A Compromise Terminology

At the 1935 Copenhagen Conference for the Unification of Criminal Law, the foregoing issues were clarified. A modern scholar has summarized the Conference's conclusions in the following manner:

> Political offenses are infringements on the organization and operation of the State, as well as those against citizens' rights deriving therefrom. Considered political are common crimes constituted by perpetration of the offenses envisaged above, as well as acts committed in order to favor such perpetration, or to enable the perpetrator of such crime to escape the application of the criminal law. However, offenders who have been motivated only by selfish or vile reasons, will not be considered as such. Infractions that could lead to a common danger or a state of terror, will not be considered political."[116]

The Copenhagen Conference, therefore, blended the objective and subjective theories into one compromise doctrine.

4. The Swiss Practice

Neither the Anglo-Saxon nor the Swiss practice, however, have followed the "Copenhagen compromise." The English doctrine, that an attack upon the State or its institutions must take place within the framework of a rebellion or power struggle, has remained firmly established. The Swiss have gone one step further; by demanding that a purposeful effort by the suspect and a reasonable chance of success exist before an offense may be characterized as political. Motivation, though not entirely ignored, is considered secondary.[117]

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mon because they were aimed at revenge or hatred, and the murder was, even in the mind of the criminal, absolutely inadequate to accomplish any political aim. *Id.*

The French still employ the motivation theory. Many Basque terrorists enjoy protection in France. The French conceded political privilege to Messrs. Holder and Kerhov, two Vietnam War opponents who had hijacked an American plane and flew to France. Although they had demanded high ransom, their offense was considered "political." French courts denied extradition of Daoud, the notorious murderer at the Munich Olympics. They conceded extradition, however, of a communist lawyer Croissant who was instrumental in aiding criminal acts of the German Red Army Faction.

See generally I DALLOZ, REPERTOIRE DE DROIT INTERNATIONALE (1968); GARCIA & MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT (1956); G. LEVASSEUR, LES ASPECTS REPRESSIFS DU TERRORISME INTERNATIONAL 119 (1976). French Extradition Law, *supra* note 42.

116. P. Riposanu, Paper on the Law of Extradition 16 (presented to the International Law Association Congress: United States-Italy-Switzerland, 1981).

117. Regarding the theory of the purpose or aim of the offense (*le bût*), see *In re Ragni*, BG 49 I 266, 275 (1923); *In re* Kesseleridze, BG 33 I 169, 194 (1907); *In re* Kilat-

D. Denial of Defense Arguments

It is worthy of note that in the light of the increasing brutality of crime and the trend towards harsher law enforcement, there have been

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schitski, BG 33 I 406 (1907).

Regarding the application of proper and adequate means in committing the crime, see *In re* Belenzow, BG 32 I 538, 542 (1906).

Regarding the good chance for success to achieve the aim behind the crime, *see Ragni*, BG 49 I, at 275.

Regarding the necessity of combatting the crime during a rebellious movement against the State or its institutions, see *In re* Camporini, BG 50 I 299, 303 (1924); *Kesseleridze*, BG 33 I, at 194.

Regarding the delineation of a political offense according to Swiss legal concepts, irrespective of the approach by treaty, *see In re* Jaroudi, BG 106 I b 297 (1980).

In *In re* Maccara Seamus, BG 110 I b 280 (1984), the Swiss Supreme Court repeated the rule it had imposed several times before: To obtain the political offense privilege, the crime committed must have been directed against the State, it must be directly connected to the cause, and it must be in proportion to the measures and consequences. This case brought to light, once again, the fact that the IRA often does not care whom it victimizes; the fact that the allegations of torture in Northern Ireland lack credibility; and the fact that Amnesty International often magnifies single events and does not prove that a suspect will be subject to discrimination in the requesting State because of his political views.

Despite such a situation existing in Tunesia, however, the Court held that the suspect must satisfy the burden of proof in order to get the privilege. *See In re* Ameur Chebbah, BG (unpubl.) (Apr. 17, 1985).

In re Ochert, 59 BG I 136 (1933), presented a case in which the Swiss Supreme Federal Court denied extradition upon request by Nazi Germany for a socialist, who prior to Hitler's taking power, had shot and killed a Nazi storm trooper. Ochert succeeded in escaping to Switzerland. The offender proved that his act had been committed during the power struggle in Germany aimed at the prevention of Nazi accession to power by Weimar Republicans. In another well known case during the War, *In re* Dieckmann, BG (unpubl.) (Sept. 9, 1943), the Court granted extradition to Vichy France of a Czech soldier who had fought in the French army against Germany and had been taken prisoner in June of 1940. After the German-French armistice at the end of June, he was handed over to the French, upon condition of internment until the end of the War. He succeeded in escaping to Switzerland after having stolen funds and forged documents. The French successfully argued that larceny and forgery were common crimes, and that there was no political offense, because the War—at least for Vichy France—had ended and no struggle for power was taking place. The French guarantied that there would be no prosecution against the Czech Government for having fought against Germany. (The value of such a promise however appeared dubious). In *In re* Hoter, BG 76 I 130 (1950), the Swiss Court granted extradition of a Gestapo agent, who in 1933 had murdered a Jewish physician in Dusseldorf, Germany, a few months after the Nazis had come to power. He tried to claim political privilege, but to no avail. The Court ruled that the power struggle in Germany had long ended at the time of the commission of the felony, and what the Nazis did, was strictly an act of revenge and race hatred.

Likewise in *In re* Peruzzo, BG 77 I 50 (1951), the Swiss Court granted extradition to Italy of a partisan who, eight months after the end of the war in Italy, he killed a Fascist official. The decision was based upon the fact that there was no longer a power struggle

occasional arguments against the unlimited enjoyment of the privilege accorded, or, at least, a more rigid interpretation (*de lege ferenda*) of the privilege.[118] Historically, many scholars have argued in favor of the extradition of the political criminal. They argue that a common crime

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and there was no danger of the Fascist rebirth that the offender claimed to seek to prevent. In one recent case, *In re* Kavic, BG 78 I 39 (1952), the Court denied extradition of two Yugoslavian pilots who had hijacked a plane with the aim of escaping Tito's Yugoslavia. The Court waived the power struggle doctrine because the Yugoslav regime at that time did not permit legal emigration. The ideal of personal freedom was considered superior to a political aim and thereby predominated over the deprivation of liberty of the crew and passengers. The decision was much criticized because of a potential discriminatory treatment of requests by authoritarian governments, in as much as the Swiss accept the right of violence "as a last resort." The Court argued that, in a totalitarian system, all opposition being suppressed, a power struggle had little chance. There was nothing left but escape, which should enjoy the same privilege as active revolt. Contrary to that result is *In re* della Savia, BG 95 I 462 (1969), the Court granted the extradition of the Italian communist for using explosives in Genoa against the local police authority. Claiming political privilege, the offender argued that there was a power struggle in Italy to overthrow the Christian Democratic regime. Although there was admittedly a strike at that time, the unions were striking for economic improvements for their members without the slightest aim to overthrow the Italian democratic system. Hence, there was no power struggle and no political privilege. In that decision, the Swiss Court also applied the rule of adequate means, ascertaining that explosions are senseless acts of terror and by no means apt to accomplish the purposes of gaining access to power or changing the system. This "adequate means" rule played an important part in an old English decision in *In re* Castioni, [1891] 1 Q.B. 149, in which it was held that for an offense to be political "it must be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or as a dispute between two parties in the State as to which is to have the government in its hands, this act being adequate." *Id.* at 156. Simply being at odds with the government, as della Savia, had claimed, arguing that the (Italina) State was not acting in good faith, is not convincing for conceding political privilege. *See della Savia*, BG 95 I, at 464.

As a matter of fact, Swiss jurisprudence grants political privilege only for political acts and decided in *In re* Vogt, 50 BG I 249, (1924), that a strike for the improvement of conditions is never a power struggle, and violence committed during a strike deserves no political offense consideration, (the offender was extradited). In that respect, Switzerland distinguishes itself from other European concepts, notably Italy, where a strike is considered a political matter. *See* P. Nuvolone, *Political Offense and Asylum*, 7 HEFTE DER VEREINIGUNG FÜR GEDANKENAUSTAUSCH ZWISCHEN DEUTSCHEN UND ITALIENISCHEN JURISTEN 1 (1971) citing some important decisions by the Italian Corte di Cassazione, regarding equal privilege for political and social issues.

The Austrian Extradition and Assistance Act of 1979, *supra* note 57, para. 14, follows the Swiss practice of requiring a preponderence of evidence showing a political rather than a common crime.

118. The question is whether treaties and conventions are ius cogens, or rather only entitle the requested country to refuse the request. It is normally understood that when the privilege is conceded, the offender goes free. The ECE provides that extradition "shall not" (not may not) be granted. ECE, *supra* note 4, Art. 3(1).

only affects the rights of a few, whereas a political crime has a much greater potential for injuring society as a whole. One might answer that some good may be done, too. If we then start weighing the good effect against the bad effects of a political crime, we shall have to judge each case on its merits.[119]

There are a few sound arguments in favor of extradition of political criminals. First, the disturbance of public order is threatened as long as the criminal is at large. In addition, the refusal to extradite necessarily implies interference into the internal affairs of another country.[120] Have we the right to express a lack of confidence in a foreign judge's impartiality? That is exactly what we are doing by refusing extradition.[121]

II. THE ARGUMENTS FOR AND AGAINST SUSTAINING THE PRIVILEGE OF THE POLITICAL OFFENSE

A. Justifications for the Defense

The majority of scholars believe that the political offense exception should be maintained. Many of the reasons espoused, however,

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119. A German scholar, Franz Liszt, in his classic text LISZT, ZEITSCHINFT FÜR STRAFRECHTSUISSENSCHAFT 66 (1882), taught that the refusal to extradite is based upon the old opinion that State's power is considered inemical to the rights of citizens. *Id.* at 65.

120. *See supra*, notes 117-18 and accompanying text.

121. The French scholar Grivaz argued that the public deserves a great deal more protection against and from political disturbance by rebels than by common criminals. F. GRIVAZ, L'EXTRADITION ET DES DELITS POLITIQUES 105 (1894). Because criminals tend to violate only the life or the property of one or a few individual victims, Saint Aubin stated that it is the danger to the public that is relevant, and by extraditing the felon, we secure his punishment and do not any longer interfere with the internal affairs of another country, virtually expressing our complete trust for the competence of our colleagues across the border. SAINT AUBIN, L'EXTRADITION ET LE DROIT THÉORIQUE ET APPLIQUE 398 (1913). The issue of whether it is impossible to limit the discussion to the expediency of extraditing the offender in cases in which the political regime in the states in question is the same, is a political and not a legal issue. Because political conditions vary, however, not only from country to country, but also from time to time, it is not certain at all that nations with the same background and cultural and social concepts will always be disposed to mutually surrender their opponents. *See* SCHULTZ, *supra* note 6, at 16. *See also In re* Ktir, 87 BG 134 (1961). In this case, the defendant, a French national, was a member of the Algerian Liberation Movement (F.L.N.). He was responsible, along with three others, for the killing of an F.L.N. member suspected of treason. France requested his extradition from Switzerland, where he had fled. He argued against extradition on the ground that France was at war with the F.L.N. at the time, and that the act he had committed was paramount to killing an enemy. Thus, he made the changing political climate in France a basis for his defense.

cannot withstand close scrutiny. An analysis of these reasons and of valid justifications for the defense are set forth below.

1. Motive

Many theorists say that there are no selfish reasons when committing a political crime. Those criminals are altruistic and, from a social point of view, such crime is less despicable. The offender fights for the rights of others; self-sacrifice and patriotism justify his acts.[122] These arguments, however, fail to perceive the ambition, the hunger for power, the destructive anger, the envy for the achievements by others and the resulting hate of the "establishment" that is almost always underlying such acts. Politics has become a career and the modern Robin Hood hopes, upon his successful operation, to become a Minister in the new government.[123]

2. Bias Against the Foreign Judge

The perception that the judge from the requesting state may be under an undue public pressure, which prevents a fair application of the law is indeed a valid argument against extraditing a political offender. When a certain degree of independence of jurisprudence is constitutionally guaranteed, however, and when there are appeals and reviews of the sentence by higher courts, this argument is not too convincing. Although it is true that the climate of a political trial is often dubious and fraught with uncertainty, why is the requested State better equipped to do a job of administering justice than a foreign judge? Are we really so free from pressure ourselves, as well as from bias in light of the committed crime, regardless of where it might have been perpetrated?[124]

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122. *See* P. FELCHIN, DAS POLITISHE DELIKT 150 (1979), at 150, in which the author describes the trend towards "compassion" for acts of "liberation" beginning in the middle of the last century and lasting until recently. *Id.*

123. C. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIME 375 (1974); 1 J. ORTOLAN, ELEMENTS DE DROIT PÉNAL 303 (1875); 2 J.P. BERNARD, TRAITE THÉORIQUE ET PRATIQUE DE L'EXTRADITION 252 (1890).

124. *See* FELCHIN, *supra* note 122, at 149. Public sentiment and political pressure played a part in two decisions by the Swiss courts in recent history. In May, 1923, the Russian expatriate Moritz Conradi shot the Soviet delegate to the Ouchy Peace Conference. He claimed "political privilege"—which does not exist in the penal code—and was acquitted. "Exceptional circumstances explained, if not justified the crime," so it is said. In February, 1936, however, the Jewish student Frankfurter shot and killed the Nazi Gauleiter Gustloff at Davos. Nazi propaganda, labelling the politically motivated act as a common crime perpetrated by Bolshevik agents, put enormous pressure on Switzerland, and, consequently, the Swiss Court sentenced Frankfurter to life imprisonment. The

3. The Exile

Some scholars have argued that because exile is already such a severe punishment, extradition appears superfluous. There is not the slightest legal basis, however, for such an argument. Although this argument seems to be very humanitarian, it does not take into account the criminal claim upon the felon.[125] Forced inactivity, so goes the argument, and the silencing of the felon in his refuge may mean more to an idealist than the potential martyrdom in his native land. The authorities, therefore, may just be doing him a favor by extraditing him. We know too well, however, that exile does not mean silence anymore. On the contrary, today, political exiles continue their activities from abroad, undisturbed by the political harassment to which they are normally subjected in their native land. Many misdeeds have resulted from exile, as recent history has shown.[126]

Court concluded that no matter how sound the reasons of the criminal, a "murder remains a murder" which must be punished by the maximum sentence possible under the law. After the war, when German pressure ceased, the first act of the competent Swiss authorities was to pardon the offender, and he became a well known writer in Israel. For further details on the Frankfurter case, see Neue Zürcher Zeitung, Feb. 4, 1986 (on the 50th anniversary of Frankfurter's act).

The systematic refusal to extradite spares the judge the delicate task of pronouncing himself on the independence of the foreign courts in the requesting country, *see* H. DOWNEDIEU DE VABRES, LES PRINCIPES MODERIVES DE DROIT PENAL INTERNATIONAL, 269 (1928), but the contrary may just as well be argued. In *In re* Bodenan, BG (unpubl.) (Aug. 13, 1973), Bodenan had hijacked a Spanish plane with former Zaire president Tsombe in order to bring him to Algiers. The hijacker fled to Switzerland, and upon Spain's request under treaty, he was surrendered with the condition that there would be no prosecution in Spain for anything but the plane's capture, especially not for assisting Tsombe to get to Algiers. Doubt was expressed in the impartiality and independence of the Spanish judge (Algeria granted Tsombe asylum under a Moslem rule).

125. Lammasch has said that a thief or a murderer does not really care. For him no home exists; he is guided by the rule: "*ubi bene, ibi patria*". H. LAMMASCH, RECHT DER-AUSLIEFERUNG WEGEN POLITISCHER VERBRECHEN, 234 (1884). People who have fought for a cause might feel differently; being torn away from one's home is hard indeed. Switzerland, whose concept of criminal law is based upon the society's right and interest in the punishment of the criminal, does not recognize asylum as a punishment. There are, of course, other concepts of the purpose of criminal law, but these are becoming subsidiary, though still relevant.

126. It depends, of course, on the exile country that is selected by the felon. Switzerland denies the right to actively engage in political activity to anyone seeking asylum. Abstaining from such activity is positive Swiss law. *See* 1855 BB1 I 455. *See also* SCHULTZ, *supra* note 6, at 23. The doctrine of "political opportunism in permitting political activity to exiles" does not mean that the asylum necessarily adheres to the ideology of the refugee. *See* O. KIRCHHEIMER, POLITICAL JUSTICE 563 (1965). The German Imperial Government supported Lenin's activity in order to overthrow the Czar. What prompted Giscard d'Estaing to permit Khoumeiny's work from his French shelter against the Shah, has remained a political mystery. It could have been in the hope that France would

4. Passed Danger

Some scholars have argued that, once out of the country of the commission of his act, the political felon ceases to be dangerous to his community because he is no longer capable of attacking his object.[127] Yet even this argument is no longer valid. Terrorist activity is frequently more effectively continued from a political shelter. Harm to the public continues—not only in his native land, but also in his asylum—no matter how one restricts the political activity.[128]

5. Different Concepts of Punishability

The prohibition against double punishability of an extraditable offense makes the argument against extradition superfluous. Of course, there are always varying interpretations of criminal law which may affect the fate of the suspect to be surrendered,[129] but normally this variation of interpretation works in favor of the individual.[130] In all treaties, conventions and domestic laws the dual criminality rule appears to render sufficient protection to the individual notwithstanding the different concepts of punishability.[131]

6. Interference

Fear of undue interference into the judicial process of another country is often presented as an argument against extradition. This is similar, but not identical, to the "bias against the foreign judge" discussed above. By extraditing upon a request containing nothing more than the facts which are the elements of a certain crime, we actually render a positive judgment on what has been requested.[132] This is be-

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thereby have obtained a secured supply of energy, once Khoumeiny came to power.

127. *See* LAMMASCH, *supra* note 125, at 232. Some authors attribute this argument to a lack of interest in the social climate of the requesting nation. The opposite is true. "We keep the felon under control and you have peace." FELCHIN, *supra* note 122, at 168.

128. *See* LAMMASCH, *supra* note 125, at 227.

129. GUGGENHEIM, *supra* note 3, at 324; DAHM, *supra* note 9, at 281; LAMMASCH, *supra* note 125, at 164.

130. In *In re* Malatesta, BG XVII 450, (1891) extradition to Italy was refused because of "different concepts." "Conspiracy," however, is not punishable in Switzerland.

131. Identical norms do not assure identical sentences. Lammasch, who was also the last Prime Minister of the Habsburg Monarchy (with its many different nations, cultures and concepts), did not see this as a particular problem for extradition. LAMMASCH, *supra* note 125, at 230.

132. Refusing extradition to one country and granting it to another on the same grounds, appears to be abusive interference. H. LAMMASCH, *supra* note 125, at 236. There should be no examination of exceptions of fact, e.g. having acted in self-defense or under duress. The facts are accepted "as is." *See In re* Ockert, 59 BG I 136, 144 (1933), *In re*

cause, contrary to the Anglo-Saxon doctrine and its statutes, the European judge does not examine the "probable cause" but accepts the facts as presented.[133] By refusing a request we implicitly interfere, saying "what you request is unacceptable." Hence, non-interference is a pure fiction because any examination of a request inevitably constitutes interference.[134]

C. *Resistance*

The most valid argument in favor of the political privilege is the established right to resist oppression. When the requesting country represents a totalitarian (or an authoritarian) system and when human rights are violated, resistance is regarded as legitimate. Those resisting in order to maintain freedom and law in the course of their struggle deserve protection.[135] Such protection presupposes that the foreign regime does not permit a proper and legitimate opposition. Defined from the legal and not from the ideological view, it would mean that when violent resistance is the *ultima ratio* (the last resort), then extraditability is excluded.

Violent resistance is manifest in the form of armed rebellion by a group (or a nation) against an oppressor, national or foreign. It is also recognized as such when individual acts are committed against tyrants or leaders of oppressive regimes. It constitutes an act of defense—be it self-defense or one under duress. Violent resistance can be privileged only when all other means of resistance of legitimate character have proved to be of no avail. It is interesting to note that the *ultima ratio* thesis is even accepted in socialist regimes.[136]

Kavic, 78 BG I 39 (1952).

133. The IMAC, *supra* note 1, art. 2, permits refusal upon obvious defects. Extradition may also be refused if "contrary to public order." *See In re* Hoter, BG 76 I 130, 237 (1950); *See also In re* Kavic, BG 78 I 39, 243 (1952) (seeking extradition upon revoked amnesty constituted public order).

134. In *In re* Ragni, 49 BG I 266 (1923), the Swiss Supreme Federal Court denied extradition to Facist Italy of an alleged terrorist sentenced in absentia. Arguing that the sentence had been the result of facist pressure, the Court assumed an "extended political crime." This provoked a charge by the Italian Government of interference with its sovereignty.

135. Swiss practice accepts violent resistance only when all other methods fail, i.e., only in totalitarian or authoritarian regimes. This is termed the doctrine of *ultima ratio*. *See, e.g., In re* Gilette, BG 91 I 127 (1965); *In re* Watin, BG 90 I 298 (1964); *In re* Nappi, BG 78 I 139 (1952); *In re* Rabat-Limoges, BG 43 I 74 (1917). *See also In re* Pavan, BG 54 I 215 (1928) (necessity of avoiding excessive and inadequate means of violence). A recent speech by Swiss Justice Minister before Parliament reaffirmed this concept. *See* Neue Zürcher Zeitung Apr. 19, 1986 ("no right of resistance in a system of law").

136. The old constitution of the German Democratic Republic, which was in force

D. *Asylum and Extended Sets of Political Offenders*

Active resistance to political oppression is equivalent to "passive resistance by evading oppression" with or without committing (or having to commit) a relative political offense.[137] It may simply mean escape, either legally or illegally, for the purpose of finding a shelter.[138] The right of staying in and receiving protection from the shelter creates a perpetual tension with the *raison d'état* of the sheltering State[139]—which is given absolute discretionary power to either grant or refuse the shelter.[140] There is, notwithstanding that discretion, a limit as to what the refuge State can do. It cannot return the refugee to his

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until 1968, contained a clause giving the right to every citizen to resist measures, DIE VERFUSSUNG DER DDR. (E. GER.), that apparently are in conflict with socialism. The new constitution in force since 1968, following the Czech tragedy, eliminated that right, and it appears nowhere in the new law.

In the case of refugees from Eastern countries or Cuba who are wanted for counter-revolutionary activities, but the request is made for ordinary crimes, since no power struggle is taking place in those countries, the socialist power being well established, Western Jurisprudence had to construe a "political crime." In an old decision, *In re* Castioni, [1891] 1 QB 149, 156, the Court held that although political crime must be in course of disturbance, resistance against oppression must not. The burden of proof shifts from the accused to the government to show that surrender is sought for a common crime. *See also* Schtrake v. Gov't of Israel [1962] All E.R. 529, 534.

137. *In re* Kavic, BG 78 I 39 (1952).

138. Shooting one's way across borders or killing a Communist People's Policeman at the Berlin Wall in order to save oneself and assure this passage across the iron curtain, in both cases there would be no extradition.

139. Asylum in Switzerland is authorized by ASYGESETZ, enacted in 1978, and in force as of January 1, 1980. BB1.1977 III 120. There must be a valid reason to believe that the refugee, upon return to his country, could be prosecuted for a political offense because of his race, religion, nationality or political belief, or he had been or might be the victim of a violation of human rights or human dignity. *Id.*, art. 3. This corresponds to the 1951 Geneva Refugee Convention. SR.0.142.30. Article 14 of the United Nations International Bill of Human Rights, G.A. Res. 217(III), U.N. Doc. A/810, at 74 (1948), and the Human Rights Convention of 1950, art. 3 enacted as Swiss law SR.0.101. This commitment to grant asylum has for many years been contrasted with the maxim of discretionary power of the sovereign state. There has been no court decision, as yet, overruling that power since the law has been in force. In the past, however, it has created problems for Switzerland, expecially during World War II—when, under the popular slogan, "The Boat is Full" and antisemitic pressure, thousands of Jewish refugees from Nazi-occupied Europe were returned at the border and into certain death.

In *In re* Teszler, BG 92 I 382 (1966) the Court granted extradition regardless of the refugee status. Asylum does not confer immunity from extradition unless an evident reason exists for an extended political offense. It is arguable whether nonrefoulment of a refugee is still valid when a common crime is committed by the suspect after his refugee status was established and/or asylum was granted.

140. *See* SCHULTZ, *supra* note 6, at 23-24.

native country, under the principle of non-refoulement.[141] That is why treaties deny surrender of political offenders threatened by political persecution.[142] The IMAC adopted the same rule.[143]

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141. Kalin, *Principle of Non-Refoulement*, in 2 EUROPE HOCHSCHULSCHRIFTEN (1982). The United Nations Convention Relating to the States of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176 [hereinafter the U.N. Convention of 1951], and the European Convention on Human Rights, *see supra* note 101, have become Swiss law. Refoulement has therefore been prohibited for the last thirty years, as confirmed by the new law. *See* ASYLGESETZ, *supra* note 139. Non-refoulement is the replacement for the unrecognized right of the individual to be granted asylum. Consistent with the *raison d'état* allowing for denial of asylum, the refugee has no established right to shelter; he is only protected from expulsion to his native country. Kalin asserts that even if the petition for asylum is dismissed for lack of a concrete state of persecutibility, the refugee cannot be returned. *Id.* His thesis is supported by the fact that a petition for asylum conveys the assumption of potential persecution in the country of origin. Article 33 of the U.N. Convention of 1951, *supra*, prohibits not only the return of a refugee to territories where his life or freedom would be in danger, but also the refusal (at the border) to allow the refugee to enter the country where shelter is sought. Kalin suggests that this practice is consistent with the position taken by the Council of Europe and the Executive Committee of the United Nations Commissariat for Refugees, although it undoubtedly affects the status of a nation's sovereignty. *Id.* This may, however, lead to abuse, especially if the refugee presents a political case, but is actually looking for employment or seeking to improve his economic activity. The problem is even more difficult with refugees from totalitarian countries.

With its prior bad record, Switzerland might be inclined to be overgenerous in the iterpretation of persecutability as a sort of "affirmative action." Germany, for similar reasons, adheres to the same practice. The German Constitutional Court (Judgment of February 4, 1959, BVerfG BEW 174-80 granted asylum on an indication that proceedings in the foreign country might be somewhat "incorrect." Great Britain required a more "concrete danger" for Polish sailors, who after committing mutiny and imprisoning the officers on their "Battory," sought asylum in England [1955] 1 All E.R. 31. (As to the United States, *see* LIEBER, NEW DEVELOPMENT IN THE LAW OF ASYLUM 146 (1973), who cites the story of the Lithuanian sailor who jumped an American coastal boat, but was returned to his Soviet captain upon the latter's (allegedly sworn) statement that the sailor had stolen $2,000 from the purser in order to escape and find a new home in the United States. The sailor was forcefully surrendered to his homeland and was sentenced to serve ten years in the Gulag.

142. Article 3 of the ECE requires reason to believe that the potential prejudice, on account of race, religion, nationality or politial opinion, exists. ECE, *supra* note 4, art 3(2). Article 2 of the IMAC finds it sufficient if the situation of the pursued might be aggravated. IMAC, *supra* note 1, art. 2, paras. b & c. (Reading the original Italian text, I am inclined to translate it as "if the proceedings abroad create a risk of aggravating the situation of the pursued."). In *In re Losembe*, Zaire was denied extradition when the ECE was erroneously applied. Zaire's treaty left the definition of political offense to the requested State. *See* Extradition Treaty, May 13, 1938, Zaire-Switzerland, 200 L.N.T.S. 217, T.I.A.S. No. 4420 (extension of Extradition Treaty, May 13, 1874, Belgium-Switzerland, 147 Parry's T.S. 455). In article 2, paragraphs b and c of the IMAC *supra* note 1, it is easy to trace the risk potential. *See also supra* PART TWO § II, C.

Concerning other decisions denying extradition for an "extended political offense" when the potential existed for persecution in the requesting country, see *In re* Bagci, BG

III. Abusive Application of Political Privilege

Although the vast majority of countries favor the political privilege, the protection of a common crime by depicting it as a political one, or by the seeking of asylum without real political risk of political prosecution, has led international jurisprudence and legislation to formulate limits to the application of the political privilege.

A. Protection of the Head of State

The first to limit the privilege were the Belgians, who, in 1856, introduced the "*attentat* clause" after an attempt had been made upon the life of Emperor Napoleon III. The French had demanded extradition of the criminal, who had escaped to Belgium. So the Belgians, under pressure from its powerful neighbor, enacted the restriction to the then prevailing political offense exception. This clause has been incorporated into many European extradition laws including the ECE.[144] Switzerland, upon ratification, raised an exception by

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108 I b 301 (1982); *In re* Gilette, BG 91 I 127 (1965); *In re* Kavic, BG 78 I 39 (1952); *In re* Nappi, BG 78 I 134 (1952); *In re* Rabat-Limoges, BG 43 I 74 (1917). More recent decisions have tended to grant extradition in light of the increase in crime and terrorism, even though the cases did not necessarily involve terrorism. Thus, the Swiss Supreme Court in *In re* Bogdanovic, BG 111 I b 52 (1985), held that the political situation in another country does not prove *in concreto* an extended political offense potential when the suspect is returned to that country, and article 3, paragraph 2 of the ECE would preclude such a presumption in general, absent special circumstances. The Swiss Court has ruled that the fact that generally longer sentences are imposed in Italy than in Switzerland is not a sufficient reason to deny extradition. *See In re* Salah Abdallah, BG (unpubl.) (Jan. 15, 1985).

The Court has admitted, however, that it is difficult to differentiate between a normal political offense, according to article 3, paragraph 2 of the ECE or article 55 of the IMAC, from an extended political offense, when persecution is foreseeable for political or other reasons. The Federal court must be called upon by the Federal Office of Police to make a determination if such a potential exists. In such an instance, neither the requesting state nor the requested state need prove such a potential exists, the Supreme Court may still assume it. Regardless, though, more than a general description of the political situation as it relates to the extended political offense must be shown; the danger to the individual suspect must be shown *in concreto. See In re* Veronica Nelson, BG 110 I b 185 (1984) (a mere allegation by a suspect that upon extradition she might be subjected to mistreatment or torture is insufficient; it must be proven).

The Austrian doctrine regarding the extended political offense is referred to as "extradition asylum" and prohibits extradition if a potential exists for a discriminatory policy by the requesting State. *See* Austrian Extradition Law, *supra* note 1, para. 19(3). Austria tends to deny extradition if no contrary proof is submitted, i.e., that no discriminatory treatment would take place; concrete evidence of persecution is not required.

143. IMAC, *supra* note 1, art. 3, para. 1.

144. The ECE provides that "[t]he taking or attempted taking of the life of a head of state or a member of his family shall not be deemed to be a political offense for the

reservation.[145]

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purpose of this Convention." ECE, *supra* note 4, art. 3(2). Garcia-Mora feels that the "*attendat* clause has been mechanistically incorporated into extradition treaties without much thought as to whether changing conditions have made it any longer useful." M. GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 86 (1956). Most critics say that the murder of a tyrant has always been considered political because it is not directed at him personally but at the system he represents. When King Umberto I was killed at Monza in 1900 and his assassin Jaffei fled to Switzerland, the Swiss Supreme Federal Court granted extradition because the murder had no connection with an existing struggle for power, nor did it serve a given political aim or purpose, not only because the victim was a head of state. The Italian Government had not enacted the *attentat* clause, hence the act remained political. *See In re* Jaffei, BG 27 I 52 (1901). In fact, the Torino Court of Appeals refused to surrender to Yugoslavia or France the assassin of King Alexander of Yugoslavia and Prime Minister Barthou. *In re* Pavelic, Ann. Dig. 158 (Torino Ct. App. 1934). Upon ratifying the ECE, Italy made no reservation in this respect.

145. Switzerland reserved the right to refuse an extradition based upon article 3, paragraph 1 of the ECE even if the request has been made because of a crime against the life of the head of state or a member of his family. Swiss Reservations to the ECE, *supra* note 16, at art. 3(3). Prior to the ECE, the Swiss had reserved the decision to the Court according to circumstances of each case.

In Watin v. FPM, BG 90 I 298 (1964), the Swiss Supreme Federal Court refused to extradite Watin, an OAS leader who had been sentenced to death in absentia by a French court for having tried to kill de Gaulle. The decision was criticized because Watin had other means available to him in democratic France to oppose de Gaulle's policy of freeing Algeria and ending the rebellion there. The doctrine of *ultima ratio*, however, had not as yet been adopted. There is probably no debate when dictatorial governments have committed acts of atrocity to arouse the indignation of the civilized world. Garcia-Mora states that "[i]n the presence of . . . incontestable facts, one needs no special effort to see how offenses against the head of a totalitarian state may appear as the only alternative to peoples suffering from persecution and oppression . . . ." GARCIA-MORA, *supra* note 144, at 85. There is no justifiable reason why such acts should be excluded from the category of political offenses, and, in fact, the IMAC has not enacted the clause, nor has any treaty to which Switzerland is a party, which embodies it. Of the European signatories of the ECE, Sandinavia has made the same reservation as Switzerland. The decision of the administrative authority in the case of Behir Celenk, took no notice of the head of state clause in the reservation. The suspect was requested by Italy as an accessory to the attempted assassination of the Pope by the Turk Ali Agca in May of 1980. Another accessory had previously been surrendered. *See supra* note 4. Celenk was alleged to have purchased a pistol in Zurich and to have given it to Agca in Milan, Italy, on May 9th, a few days before the assassination attempt. Extradition was sought for illicit arms transportation, conspiracy and aiding the principal criminal. The first two offenses failed because of dual criminality. The third offense was denied by the suspect who asserted that he had no knowledge of the victim. The Swiss Court, however, defeated his argument under the doctrine of *dolus eventualis:* the accused must have known a crime was to be committed with the pistol, irrespective of who the victim was. *In Re* Celenk, Judgment of October 13, 1982 BG (unpublished). Because the Swiss Court did not examine facts, it took the Italian request as correct. *Id. See In Re* Jaroudi, BG 106 I B 297 (1980). Any claim of political offense exception would fail also. Although an attempt on a head of state is not a political offense according to the ECE, it is recognized by Switzer-

B. War Crimes and Crimes Against Humanity

1. Public International Law Basis.

Any violation that has been committed against the citizens of a State by its governing body is not recognized as a political offense. That will not necessarily mean that such a body or its members must be surrendered to the territory where their crimes have been perpetrated. Practically, this can happen only once the regime has changed and the previous governmental body—the criminals—have escaped and are sought for extradition by the new regime. This is a rare occurrence. The political offense exception has always been accepted so that extradition was never even attempted.[146] Matters changed, however, following World War II. In 1946, the U.N. General Assembly passed a resolution calling upon members to extradite war criminals.[147] Certain criminals were surrendered by the Allies to the Eastern countries, the territory of their crimes. Neutrals generally refused, for example, Brazil refused to extradite "quislings" to Denmark and Norway claiming political privilege. Belgium and France cooperated. A Belgian collaborator with the Nazi enemy was surrendered by the Paris Court of Appeal.[148]

A series of Allied and U.N. agreements and resolutions was adopted to prosecute and punish the following crimes:[149]

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land as such on the basis of the reservation mentioned above. A "political offense" defense requires an act within a power struggle, by adequate means and with an aim effective to accomplish a political end. None of the aforementioned factors was applicable to Celenk's actions. Celenk also raised a jurisdiction defense based on Swiss Reservations to the ECE, *supra* note 16, arts. 7 & 8. *See generally* Tani v. FPM, BG 101 I a 402 (1975). Because part of the crime had been committed in Switzerland, Celenk argued that jurisdiction lay solely in a Swiss Court. Under Swiss law, however, the purchase and possession of a weapon is not punishable, even as an act of aiding or being an accessory to a crime. Hence, as far as Switzerland is concerned, the crime was committed entirely in Italy and extradition was granted. *See In re* Celenk, *supra*. *See also* L.v. Zurich, BG 104 IV 77 (1978); *In re* Lenzlinger, BG 104 IV 86 (1978).

Article V (2) of the United States-Italy Extradition Treaty of 1983 considers any attack on a head of state or head of government (in the United States the President only) or their families as nonpolitical if the crime had grave consequences for the general public.

146. *See* the cases of Russian expatriates after the Red revolution, the German Kaiser; recently: Iranian Shah Pahlevi and Somoza.

147. U.N. Resolution on the Extradition and Punishment of War Criminals, G.A. Res. VIII(3), U.N. Doc. A/64, at 9 (1946).

148. *In re* Coleman, 14 I.L.R. 139 (Court of Appeal of Paris 1947).

149. C. BASSIOUNI, *supra* note 125, at 419; P. FELCHLIN, *supra* note 122, at 245; London Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 472 E.A.S. 3, *reprinted in* 9 INTERNATIONAL LEGISLATION 637 (M.O. Hudson ed. 1950). The Charter was later reaffirmed. *See* G.A. Res. 95(I), U.N. Doc. A/64/Add. 1, at 188 (1947)

a) crimes against peace; launching an aggressive war;[150]
b) war crimes, crimes committed during the war;[151]
c) crimes against humanity (genocide) in war and peace;[152]
d) crimes by organizations and members thereof that had the purpose of committing any one of the crimes above.[153]

2. Extradition of War Criminals

Switzerland, although not a member of the U.N., has adhered to most of U.N. conventions. It has, however, not punished Swiss Nazis

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noted in (1946-47) 1 U.N.Y.B. 66 (1946-47), U.N. Sales No. 1947.1.18 (1947).

150. Inter-Allied Declaration on the Punishment of War Crimes, of Jan. 13, 1943, *reprinted in* WAR CRIMES COMMISSION, UNITED NATIONS, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 91-92 (1948). Tripartite Conference, Oct. 19-30, 1943, Great Britain-Soviet Union-United States, Declaration on Atrocities, *reprinted in* 38 AM. J. INT'L L. 6 (Supp. 1944). Extradition and Punishment of War Criminals. G.A. Res. VIII(3), U.N. Doc. A/64, at 10 (1946), *reprinted in* 1946 1 U.N.Y.B. 66.

151. Violations are specified in four Geneva Conventions: Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces, 1949, art. 50, 75 U.N.T.S. No. 970; Geneva Convention for Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 1949, art. 51, 75 U.N.T.S. No. 971; Geneva Convention Relative to the Treatment of Prisoners of War, 1949, art. 130, 75 U.N.T.S. No. 972 ; Geneva Convention Relative to the Protection of Citizens in Time of War, Aug. 12, 1949, art. 147, 75 U.N.T.S. No. 972.

152. *See* G.A. Res. 96(1), U.N. Doc. A/64/Add. 1, at 188 (1947). Resolution 96(1) declared that genocide is a crime against international law. *Id.* Genocide denies the existence of groups of human beings which challenge civilization, but it is a delicate task to formulate rules for the prevention of genocide including the indication of punishment. The Convention listed murder, serious assault on physical and mental integrity, intentional subjection to circumstances leading to total destruction, measures preventing birth, removal of children, all done to a group ethnic, religious, racial, political, including cultural destruction by denial of the use of books, language, destruction of historical monuments, and the like. *Id.* Added was an article on preparatory acts to the crime which was to include the construction of machinery for the liquidation of the group, as well as the adoption of legal measure. *Id.* Likewise, incitation was included. *Id.* Immunity to heads of state and diplomats was waived. The problem of superior orders was raised in connection with responsibility imposed on the individual offender, but was left to domestic interpretation. *Id.* Jurisdiction is reserved to the State where the crime is committed, save when the crimes are committed by those in authority in that State. *Id.* The Convention reflects the basic disagreements that appeared already shortly after the War among allies.

153. The organizations that were declared "criminal" by the Nuremberg International War Tribunal were limited to German Nazi Organizations They could not be extended to more recent organizations which have been declared "criminal" by the United Nation's Assembly (but without binding the members of the United Nations). Notably, the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVII), 28 U.N. GAOR Supp. (no 30) at 75, U.N. Doc. A/9030 (1973), specifically provides that persons charged with the crime of apartheid may be tried by a competent tribunal of any state party to the Convention or by an interna-

for any of the crimes listed. It has punished Swiss Nazis because of their service in foreign military forces, and their failure to serve in the Swiss Service, which is obligatory for all citizens. Switzerland has also surrendered German nationals for war crimes.[154]

Universally, as is well known, the extradition and punishment for the crimes listed above, has been the exception rather than the rule. Nazi criminals live free and unpunished all over the world, including Germany.[155]

On October 15, 1975, the Council of Europe adopted an "Additional Protocol to the European Convention on Extradition" which excluded the political privilege of article 3 of the ECE for War Crimes and Crimes Against Humanity.[156] Most signatories have adhered without reservation. The IMAC, in article 3, paragraph 2 stipulates that the plea of a political character shall not be taken into account if the act was aimed at the extermination or suppression of a population group on account of nationality, race, religion or ethnic, social or political relationship.[157]

3. Prescriptability of War Crimes

The question as to prescription of these crimes has not been answered unanimously. In fact, there are many legal opinions against any exception to the general rules of the statutes of limitation. Many countries have, in fact, denied extradition of Nazi criminals for that reason.[158] The two important international conventions in this matter

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tional penal tribunal. *See also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 75 U.N.T.S. at 135.

154. Genocide was never considered political. *In re* Kroeger, 1966, 92 BG I 108.

155. C. VAN DEN WIJNGAERT, INFRACTION GRAVES AUX CONVENTIONS DE GENÈVE ET A LEUR PROTOCOLES ADDITIONNELS EN REGARD AUX RÈGLES INTERNATIONALES CONERNANT LA PRESCRIPTION DES CRIMES DE GUERRE ET L'EXTRADITION (1982). *See also* C. VAN DEN WIJNGAERT, POLITICAL OFFENSE EXCEPTION TO EXTRADITION 7 (1980), which criticized the violation of the principle *aut dedere, aut punire* as a grave infringement against the Hague Convention on Prevention and Punishment of Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277. *See also* Supplementary Convention, U.N. Doc. E/CN 4/906 (regarding the prescription of such crimes).

156. Additional Protocol to the European Convention on Extradition, Oct. 15, 1975, Europ. T.S. 86. Crimes not excluded from the political privilege of Article 3 of the ECE by this Protocol are: (1)(a) launching aggressive wars, and (1)(d) criminal organizations. Terrorist groups, however, could not be sentenced under this Protocol and reman unaffected. *Id.*

157. Contrary to the ECE, the IMAC added a paragraph (b) to the exclusion of political plea article, namely if the act "appears particularly reprehensible because the offender jeopardized freedom, life or limb of men . . . . " IMAC, *supra* note 1, art. 3, para. 2(b).

158. Opinions favoring non-prescriptability have been reported. *See,* J. GRAVEN, *Les*

have thus far received minimal support from the international community. The U.N. Agreement on Non-Prescriptability of crimes against Humanity[159] has been ratified by only thirty-nine U.N. members, mostly from the East,[160] and in the European Convention by only Germany, Holland and Switzerland.[161] A few countries have adopted domestic laws.[162] Switzerland enacted article 75 of the Swiss Penal Code, as well as incorporating it into the IMAC in article 109.[163] It also made a reservation to the European Convention.[164]

C. *Anarchism and Terrorism*

The most important limitation to the plea of political privilege is anarchism. Anarchism is defined as the resistance to any and all State power, and the negation of organized society. Lawyers and politicians have always demanded that anarchist violence be considered non-political because it does not come close to the basic definition of a political crime.[165] The French Statute of 1927, notwithstanding the motivation (subjective) theory prevailing in France at that time, excluded from the political exception those "very grave" acts of anarchism even when they were committed upon apparent unselfish motives.[166] Switzerland

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Crimes Contre L'Humanite Peuvent—Ils Beneficier de la Prescription?, 81 REVUE PÉNALE SUISSE 113, 119 (1965); *See also* SOMMAIRE, *Le Projet de Convention Internationale sur L'Imprescriptibilité des Crimes de Guerre et des Crimes Contre L'Humanité*, 37 REVUE INTERNATIONALE DE DROIT PENAL 379 (1966). For cases concerning the denial of non-prescriptability and hence the extradition of criminals, *see In re* De Bernonville, 22 I.L.R. 527 (Sup. Ct. Brasil 1955); *In re* Degrelle, (unpubl.) State Council of Spain 1956). C. BASSIOUNI, *supra* note 123, at 424; VAN DEN WIJNGAERT, *supra* note 155, at 144.

159. U.N. Agreement on Non-Prescriptability of Crimes Against Humanity.

160. *See, e.g.*, Cameroon, Gambia, India, Kenya, Philippines, Rwanda, Tunesia and Yugoslavia.

161. European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Jan. 25, 1974, 13 I.L.M. 540, open for signature.

162. Sechzehntes Strafechtsanderungsgesetz, 1 BGB1 1046 (W. Ger. 1979).

163. The IMAC mandates no prescription. IMAC, *supra* note 1, art. 109. Unprescriptable crimes are those aimed at extermination, *id.*, art. 3, para. 2 and terrorist acts, *id.* 3, para. 2(b).

164. Additional Protocol to the Swiss Reservation to the ECE, *supra* note 16, para. 22.

165. H. LAMMASCH, EXTRADITION OF ANARCHISTS 6 (1899); Diena, *Les delits anarchistes du Droit Public*, 2 REVUE INT'L DE DROIT PUBLIC 328 (1895); P. FELCHIN, *supra* note 122 n.45 (1979). There were some well known lawyers who represented a "middle position," although non-political, they are not common crimes. GRIVAZ, F. GRIVAZ, LEXTRADITION ET LES DELITS POLITIQUES, 292 (1894).

166. "*Les crimes les plus graves au point de vue de la morale*" are extraditable. England accepted that formulation in Meunier, [1894] 2 Q.B. 415-19 surrendering a notorious anarchist to France.

did not codify an exception for anarchistic crimes because it appeared self-evident that it related to a common crime.[167]

Although anarchists might have had certain ideas of society, modern terrorism has no ideas at all. It has neither a political aim nor a realistic chance to achieve anything, except to call attention to some underlying injustice. That is why modern terrorism goes way beyond attacking the representatives of a certain ruling class, of an existing and established power or of a detested institution. The victims of acts of anarchy are population groups, minorities, political and religious institutions, and the like, most of them not involved in the matter they attack; the means by which these acts are accomplished are brutal force, spreading terror and creating a general climate of fear. Arbitrariness of injury to the victim is a basic criterion.[168]

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167. The Swiss Extradition Law of 1892, *supra* note 22, did not contain any indication in respect to anarchist activity. The Swiss Federal Supreme Court however, denied extradition of anarchists in the following cases: *In re* Pistoles, BG V 226 (1879); *In re* Malatesta, BG XVII 450 (1881); FPM v. Bertoni, BG 26 I 227 (1900); *In re* Jaffei, BG 27 I 52 (1901); della Savia, 95 BG I 462 (1969).

168. The definition of terrorism varies according to one's political concepts. For an excellent presentation of the various definitions of terrorism, see Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L. J. 236, 238-42 (1982-1983); *see also* Note, *Terrorism and the Law of Nations*, 6 FORDHAM INT'L LAW JOURNAL 238 (1982). In connection with the Tel-Oren case in Israel and the Alien Tort Statute, and there is very little to add to her presentation of the various definitions of terrorism. It is interesting to confirm the Swiss approach which corresponds to the cited United States State Department delineation, with the exception that the word "political" was struck from the context (wherever it appears). *Id.* at 240-41. Terrorist activity in recent past has been typically unpolitical, because it does not even pretend to accomplish anything, but it is a deliberate system of murder, maiming or menacing innocents, with the sole purpose of inspiring fear without a social or political end. Thus, in *della Savia*, BG 95 I 462 (1969), the Swiss Supreme Federal Court stated that there exists no adequate proportion between acts and purpose, nor between gravity of crime and potential accomplishment. Similar arguments were used in Castori v. FPM, BG 101 I a 60 (1975), a case in which two neo-fascists were surrendered upon Italy's request for using explosives in an attack against a tax office. The offenders claimed political privilege and contended that their purpose was to restore fascism in Italy. The Court ruled lack of proportionality, without a chance or purpose.

Conceivably, some purpose could be found in committing acts just to provoke repression by the established society in the hope that the masses might revolt against that repression. Some Latin American guerillas, for example, have achieved governmental repression, but no masses have revolted. Hence, such terrorist acts would be criminal and not political.

There is no legally relevant distinction between the old idealist anarchism activity in Europe, prior to World War I, and modern terrorist organizations like the Irish Republican Army (I.R.A.) or the Badder-Meinhoff in Germany. There is a distinction to be made, however, between the political zealot who fights in Northern Ireland because there is a rebellion going on and the psychopathic murderer of the Badder-Meinhoff kind. A distinction is also justified between the PLO and the extremist elements in that group.

D. Solutions on an International Scale

1. Swiss Legislative Efforts

The invoking of the political offense exception by terrorists has forced law enforcement authorities to propose remedies, first on a national, then on an international scale. Jurisprudence in Switzerland has set clear precedents so there appears to be no particular difficulty in codifying the elements for new criminal definitions in that respect. In a message from the Federal Council to the National Council on December 10, 1979, amendments to the Penal Code were proposed and inserted into the IMAC. The new codified crimes included qualified robbery, highjacking, kidnapping, and deprivation of liberty with predictable consequences so as to endanger life or property or both. These were all extraditable offenses according to article 35 of the IMAC and would never be classified as political by their very nature.[169] Those offenses that might have a political character in accordance with article 3 were specified as nonpolitical in article 3, paragraph 2 of the IMAC.[170] They were still subject to limitation, however, so in order to make them non-prescriptable, article 109 inserted an amendment to article 75 of the Penal Code.[171]

2. International Protection of Aviation

A number of international conventions have been adopted by countries with respect to protecting aircraft, crew and passengers. These conventions have eliminated the political offense exception for

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When aims are completely unclear and the perpetrators are fighting in anonymity, there can be no debate whether we are dealing with anything political.

In *In re* Morlacchi, Judgment of December 12, 1975, BG 101 I a 602 (1975), the Swiss Supreme Federal Court emphasized the unclear aim of terror excepts terror itself. Motives for fighting cruel tyranny or even liberating a country from foreign military occupation (as reprehensible as these environments may be when innocent people are victims of the means to the end) are different from those attacking a democratic regime of Western Society. The Zurich disturbances of 1980-81 showed for the first time that even Switzerland is not immune from aimless terrorist activity. The only consolation lies in the fact that up to now, modern terrorism has been unable to attack the State's political and social structure, and even if they resort to bombing temples and cultural institutions, they have achieved nothing. Attempts to place these acts into the category of political offenses is the result of ideological bluster without the slightest legal concept.

169. BB1 1980 I 1216.

170. Supplementary Message to the IMAC, BB1. 1977 I 1217.

171. STGB, art. 75, 1951 A.S. 181, 207, 228, 300 (SR. 311.0). Non-prescriptable acts are listed in article 3, paragraph 2 of the IMAC, *supra* note 1. Geneva Convention violations include those acts which jeopardize life and limb of men by means of mass extermination or the triggering of disasters, or when hostages have been taken.

these crimes in order to protect travel by air.[172] There is, however, no indication as to non-prescriptability. Article 75 of the Swiss Penal Code applies *mutatis mutandis* in Switzerland.

3. U.N. Conventions

The United Nations, from the beginning of its post-War activities, approached the problem of international crime based upon its Charter and its human rights conventions.[173] The language of these covenants, however, did not explicitly assert terrorism to be punishable by the international community.[174] Consequently, anti-terrorist resolutions

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172. Convention on Offenses and Certain Other Acts Committed Onboard Aircraft, *opened for signature* Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219, SR 748.710.1. This Convention empowers an aircraft captain to hold suspects until landing within the territory of a signatory of the Convention. *Id.*, art. 3. This, however, would also allow a non-signatory nation, when a prior landing occurs there, to hold suspects and refuse to extradite them, corresponding to the Swiss sovereignty concept. Message of the Federal Council, Jan. 9, 1970, BB1.1970 I 33.; *see also* STGB, art. 5.

The Convention for the Suppression of Unlawful Aircraft, *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105, SR 748.710.2, specifies the maxim "*aut dedere, aut punire* (or *judicare*)" leaving intact, however, the political offense exception according to each signatory's discretion. *Id.*, art. 5.

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570, 974 U.N.T.S. 177, SR 748.710.3, requires that all signatories extradite, irrespective of any signatory's internal law making extradition dependent upon a treaty. *Id.* art. 7. Thus, Switzerland, which extradites criminals absent a treaty, is obliged to extradite under the Convention, whereas a signatory with an extradition treaty extradites under the Convention as a matter of comity. This is illogical, but respects statutes and adheres to the above noted maxim. A joint statement by the United States, Japan and England made at Bonn in 1978 urged signatories to cease flights to countries, such as Cuba and Libya, who fail to extradite hijackers. Many countries adhered while continuing communications with such countries.

173. Art. 55 of the United Nations Charter provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction, as to race, sex, language, or religion." U.N. Charter, art. 55, para. 4. Article 3 of the Universal Declaration of Human Rights proclaims that "[e]veryone has the right to life, liberty and security of person," although article 5 states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/64/Add. 2, at 71, 73 (1948). Even more direct language is contained in article 6 of the International Covenant on Civil and Political Rights: "Every human being has the inherent right to life." International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) 1 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967). This provision does not in itself confer a right to prosecute terrorists under international law.

174. *Cf.* Pollock, *supra* note 168, at 243. Pollock believes that the language of the Universal Declaration of Human Rights "implies that international terrorism would constitute a violation of human rights under international law, because the torts subsumed under terrorism by definition involve loss of liberty, subjection to torture, and cruel,

and agreements had to be adopted separately, and, as a result, very little has been accomplished because of the very different ideological attitudes of the countries that form the U.N. community.[175]

4. European Anti-Terrorism Convention

It was much easier for the civilized countries of Western Europe to come to an inter-European consensus on the remedies to be established against terrorist acts. Because the ECE left the political offense exception practically intact leaving wide discretion by the requested country,[176] the Consultative Assembly of the Council of Europe was called upon to legislate a more rigid concept. It adopted Recommendation

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inhuman and degrading treatment." *Id.* The implication that violation of these covenants by member states is a crime against the law of nations by the individual committing it—and hence, punishable and extraditable—is a noble but remote goal.

175. There appears to be in force at this time, five Conventions adopted by the United Nations referring to terrorism:

a) The four Geneva Conventions of 1949, referred to in detail *supra* note 151, which relate to war crimes. (In the fourth Convention, "criminal organizations" refers to Nazi groups only). The frequent extension of the protection of service personnel and civilians involved in a civil war or "military measures in hot pursuit of an enemy across borders" has remained academic.

b) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, G.A. Res. 3166 (XXVIII), 1 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030 (1974). The Convention has been ratified by 47 States. Switzerland, although not a member of the United Nations, ratified the convention on Dec. 31, 1974.

c) Resolution of the United Nations Assembly Against Hostage Taking, 34 U.N. GAOR Supp. (No. 39) at 23, U.N. Doc. A.34/39 (1979). The original resolution was adopted at the initiative of Germany, imposing the maxim "*aut dedera, aut judicare.*" This resolution was diluted to a nonbinding resolution, however, with two very dubious compromises in article 9(b)(ii), which permit the denial of extradition if the requested party had reason to believe that the position of the offender to be surrendered stands a risk of being prejudiced, because of "the inability of communication between a state that can protect the suspect and the suspect himself." *Id.*, Art. 9(b)(ii). The application of the Convention is also precluded when the taking of hostages is part of a fight against "colonial domination, alien occupation or racist regimes in exercising the right of self-determination." *Id.* This peculiar insistence, hitherto unknown in international law, practically allows for intervention by signatories providing protection for terrorist suspects, and, at the same time, permits denial of extradition because a third country, (interferring for the the suspect's protection) might be unable to contact the suspect. No State, however, will recognize the right of a "third protector-country" to interfere with its sovereign right to extradite or punish.

d) United Nations Convention on Physical Protection of Nuclear Material, U.N. Doc. NPT/Conf. II/6/Add. 1 (June 2, 1980).

e) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/Res/39/46 (1984).

176. ECE, *supra* note 4, art. 3, para. 1.

No. 703 (1973) concerning international terrorism. Condemning acts of terrorism, it demanded punishment notwithstanding the motivation of the act, "provided the act constituted murder or kidnapping of innocent persons endangering their life."[177] It also called upon all members to propose new definitions of "political crime" with a view toward excluding a political justification for any such crime. Early in 1974, the Council of Ministers of the European Council also adopted the nonbinding Resolution No. 74, recommending that when considering extradition requests for such acts, the prosecution of the offender must be assured before denying extradition.The final Convention was presented for signature on January 22, 1977, and Switzerland was one of the first signatories. This definitely reaffirmed the Swiss adherence to the principle of "*aut dedere, aut judicare.*"[178]

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177. *See* SCHULTZ, CONVENTION ET DÉLIT POLITIQUE 313 (1971).

178. European Convention on Terrorism, Council of Europe, *opened for signature* Jan. 22, 1977, Doc. No. i. 16792 [hereinafter ECT]. Other signators include Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Liechtenstein, Luxembourg, Norway, Spain, Netherlands, Portugal, Sweden, Great Britain, Turkey and Italy. France, Italy, Portugal, Sweden and Switzerland made a few reservations. Note the absence, thus far, of Ireland. Israel is about to sign with some reservations.

Switzerland has no jurisdiction to prosecute a foreigner having committed a crime abroad against non-Swiss interests or persons. The provision must be amended, therefore, so as to enable prosecution if Switzerland cannot extradite. STGB, arts. 6 & 7.

Municipal laws enacted after the ECT have applied exceptions to the political privilege, and have stipulated them in one way or another:

a) The German Extradition and Assistance Law, although recognizing the non-extraditability of the political offender, has excluded from political privilege the individual sentenced or sought by a foreign prosecuting authority for genocide, murder or manslaughter without premeditation, as well as for the instigation or participation in those crimes. Deutsches Rechtshilfe Gesetz, para. 6(1), 1982 BGBl 2071.

b) The Austrian Federal Extradition and Assistance Act has not gone as far as the German legislation. Consistent with the Austrian adherence to and ratification of the ECT, however, and consistent with the doctrine that all treaties are self-executing, the Austrian law has limited the political privilege to those acts which are not listed as absolutely extraditable crimes under the ECT: for example, genocide, barbarous acts endangering the public, hijacking aircraft, etc. Among Western European nations, Austria tends more than any other to protect the individual suspect. That approach may change, however, with the recent acts of terror that have taken place on Austrian soil. Bundesgesetz über Auslieferung and Rechtshilfe in Strafsachen, para. 14, 1979 BGBl 529.

c) The IMAC, *supra* note 1, art. 3, para. 1, stipulates the political privilege as such, but thereafter sets forth the exception to the exception, that is, crimes directed against groups for reasons of nationality, race, religion, or for ethnic, social or political origin, or if the act appears reprehensible because it jeopardizes or threatens to jeopardize life and limb (e.g., hijacking, the taking of hostages, or using means of mass extermination).

For the different possibilities of approach taken by the various European nations in both executive and judicial actions against terrorists, see Linke, *Internationaler Terrorismus als Rechtsproblem*, OESTERREICHISCHE JUNSTEN ZEITUNG 230 (1976).

The Convention, which was intended to overcome the political offense loophole, requires the signatories to extradite for acts of a "certain gravity."[179] It excludes these acts from the category of political offenses or from offenses inspired by political motives. These exclusions include highjacking aircraft and acts against the safety of civil aviation; acts against diplomatic personnel; kidnapping, hostage-taking or grave deprivation of liberty, and the use of bombs, hand grenades, missiles, automatic weapons and explosives, including the attempt to commit such acts, or aiding, favoring or abetting such acts.[180]

Article 2 of the Convention extends extraditability to all other crimes involving violence against life, physical integrity or liberty of any person. It also includes a serious act involving property if such act creates or is liable to create a collective danger. Unlike article 1, however, article 2 does not bind the signatories to extradite the suspect. It only permits them to do so within their discretion. Serious crimes under article 2, apparently considered less serious than those of article 1, are not *ius cogens* but rather a matter of comity.[181] Article 2 then provides for the obligation to prosecute if extradition is denied.[182]

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179. ECT, *supra* note 178, art. 1.

180. Whereas the Conventions protecting aircraft, crew and passengers, *see supra* note 172 offers a choice to surrender or prosecute, this Convention imposes extradition for all crimes unless, of course, the offender is a citizen. ECT, *supra* note 178, Art. 1.

181. ECT, *supra* note 178, art. 2. For all practical purposes, the determination as to the gravity of the act is a matter of discretionary decision by the requested State; the word in itself is vague. The Council of Ministers in its "explanatory report" used the word "odious" to delineate seriousness; however, this term is just as inexplicit. Because actual surrender is not binding upon the signatories, the interpretation of gravity, seriousness or odiousness is really secondary. The only progress the article provides for the public, is that it is considered sufficient if the public is terrorized by such act, without actual damage to life and liberty. The term "collective danger" again is controversial. It is uknown in most statutes. *See* P. LOGOZ, COMMENTAIRE DU CODE PENAL SUISSE 425 (1956).

182. ECT, *supra* note 178, art. 7. Article 6 calls for taking such measures by the contracting State as may be necessary to establish its jurisdiction over an offense mentioned in Article 1 (i.e., the very serious category of crimes), when the suspect is present in its territory and does not extradite because the jurisdiction of the requesting State is based on a rule existing equally in the law of the requested State. *Id.*, art. 6. This is an extremely complicated formula. When a Swiss citizen who commits a grave crime in Sweden is later found in England, Sweden may ask for surrender, but Great Britain may deny the request on the basis of a reservation made by virtue of article 13 (extended political offenses) although it cannot punish him for lack of territoriality competence. Switzerland, on the other hand, could request extradition provided it proves the act by a Swiss citizen comes under article 6 of the Penal Code, (i.e., if he could be extradited by Switzerland for such an offense, article 6 of the Convention then obligates the signatories concerned to adjust their jurisdictional problems by a reciprocity agreement in such a way that the culprit can be prosecuted in one of the countries involved). One would plead here for Swiss prosecution under its universality principle as against the restric-

There remains, however, one large loophole for both categories of offenses. The requested State can still pretend to have reason to believe that "the request has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons." In other words, the "extended political offense,"[183] as the above deception is termed, is a powerful method of denying extradition.

There are three other important provisions of the Convention regarding the extraditability of terrorist acts as classified in articles 1 and 2. Article 4, for example, automatically inserts into any treaty or convention among signatories, the extraditability of the listed terrorist crimes.[184] Article 8 obligates signatories to furnish to each other the broadest means of mutual assistance in criminal proceedings brought in respect to these crimes. Such mutual judicial assistance cannot be refused on the ground of the political offense exception. This includes common offenses inspired by political motives. But again, such assistance is not binding upon the signatories in the case of the "extended political offense" exception.[185] Finally, article 13 permits reservations upon depositing the instrument of acceptance or ratification with the Convention. Such reservations may deny extradition for crimes under article 1 if such crime is considered to be a strictly political offense or one inspired by political motivation.[186] It stands to reason that crimes

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tions imposed by domestic statute upon Swedish and British proceedings because of territorial-jurisdictional questions.

183. ECT, *supra* note 178, art. 5. When surrender is denied for reasons of territoriality or nationality, the contracting State in which the offender is found must prosecute "without exception whatsoever and without undue delay." *Id.* art. 7. Nevertheless, the signatory is not committed to prosecute at all. *Id.* art. 5. That loophole would probably justify the recent Swiss nonpublished decision to deny extradition of a Turkish terrorist because his Kurdish origin might aggravate his situation in Turkey, or of an Argentine terrorist group because of the story on human rights violations by Argentina. In the latter case, the Swiss Court ordered the Geneva cantonal authorities to prosecute the criminal, as called for by the Convention. *Id.*, art. 7.

184. ECT, *supra* note 178, art. 4. This insertion clause makes it possible for signators to conclude treaties that recognize political offense exceptions to terrorist crimes or to acknowledge the reciprocity for each extradition proceeding upon a request for such crime.

185. The wording of article 8(2) is the same as that of article 5: "substantial grounds for believing that the request for extradition . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons." ECE, *supra* note 178, art. 5.

186. *Id.* art. 13. There is a proviso in article 13 limiting somewhat the range of discretion conceded in reservations. The party making the reservation must take into consideration when evaluating the character of the offense in question, any particularly seri-

under article 2 will be treated in the same manner because they are less serious.

Articles 9 and 10 of the Convention concern procedural matters. They call for the Committee on Crime Problems to do whatever is possible to facilitate friendly settlements of any difficulty that may arise out of the execution of the Convention. It also mandates arbitration in case of any dispute. If the parties cannot agree on a referee for the arbitration, the European Court of Human Rights may intervene and select one.[187] In the final analysis, the Convention has many flaws. It is full of compromises that reflect the different ideological and practical approaches to the political offense and the politically inspired offense. The contrast between the Latin and Northern ideas on this matter is apparent. A certain reluctance to injure the interests of the "liberation movements," which are frequently the source of terrorist crimes, has had a tendency to weaken the steady unrelenting position necessary in the fight against terrorism. Great progress, however, is seen in the enactment of statutes mandating prosecution in the case of non-extradition.

5. Swiss Reservations

In ratifying the Convention, Switzerland made a number of reservations, which were deposited with the Secretary General of the Council of Europe:

> a) Dual criminality: if not, no surrender and no prosecution.
>
> b) Citizens: no extradition, but assured prosecution.
>
> c) Death penalty in requesting country; surrender under condition that death penalty will not be carried out. In the case of insufficient guaranty, Swiss authorities have absolute discre-

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ous aspects of the offense, for instance, that it created a collective danger to the life, physical integrity or liberty of persons, that it affected persons foreign to the motives behind it, or that cruel or vicious means were used in the commission of the offense. *Id.* This is, in fact, a very wide and ample power. An innocent non-Jewish bystander hurt by a PLO bomb attack on a temple in Paris was considered "non-involved" by the French Police Commander, a statement that was, of course, repudiated by the Prime Minister. Reservations under this article have been made by Norway, Italy, Cyprus, Denmark and Iceland, to which Sweden added a territoriality clause.

187. The arbitration tribunal consists of three members: two arbitrators, one nomnated by each party, and the referee. This tribunal lays down its own procedure; its decisions are made by majority vote, and are final. *Id.* art. 10. No provision has been made as to the suspensive effect and/or the detention of the accused pending the arbitration decision in case of a dispute between the signatories that have made the reservation. *Id.*, art. 7.

tion to extradite or prosecute. The quality of the guaranty is a purely domestic consideration.

d) "Extended political offenses" are strictly legally construed. If not, neither surrender nor prosecution are permitted.[188]

The Convention, however imperfect, did influence Swiss legislators in regard to the enactment of the IMAC and the amendments to the Penal Code contained therein.[189] It will still be necessary, however, to introduce one more measure—allowing the application of article 7 of the Convention to jurisdiction and territoriality.

The Convention on the Suppression of Terrorism entered into force on August 4, 1978, after the required minimum number of signatories had ratified it. Thereafter, the Committee of Ministers of the Council at its sixty-third session, on November 23, 1980, adopted a declaration on terrorism. The Convention, an organization of democratic States founded on the rule of law and committed to the protection of human rights and fundamental freedom reaffirmed its fight against terrorism. In so doing the Committee decided that the following questions should be examined:

a) How can the existing practices of international cooperation be made more expeditious?

b) How can the communication of information concerning crimes committed and measures taken against its perpetrator be improved and accelerated?

c) How can problems arising out of jurisdictional conflicts be settled?

Thus far, however, Europe waits for the answers to these questions; they are now only pious hopes, debate, and resolutions.[190]

E. A Summary of Swiss Jurisprudence

The reasoning which underlies the specification of serious crimes in articles 1 and 2 of the Convention of 1977 is that there is an adequate nexus between these acts and the political aim these acts are intended to accomplish. The European Council followed Swiss (and to a great extent British and United States) judicial concepts, but it also

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188. This conclusion is contestable. It may set unwanted precedents. The author would favor mandatory prosecution instead.

189. *See* Schmid-Frei-Wyss-Schouwey, *L'Entraide Judiciare Internationale en Matiere Penale*, 3 SWISS JURISTS ASSOCIATION 356, 360 (1981).

190. *See* The Conference on Tasks and Problems of the Democracy Against Terrorism, Strasbourg,France, Nov. 14, 1980.

took into consideration French and Italian doubts. Hence, each time the term "political offense" appears, the undoubtedly contestable "institution" which is called "the common offense inspired by political motives" follows. Switzerland has never recognized such a term. This is quite different, as we have seen, from the relative political offense—in which a common crime is committed to prepare, promote, assist, favor and abet the political offense. The political offense itself must remain restricted to:

a) An attack upon the powers of the State or its social and political institutions or structures, but not including private interests, i.e., multinational organizations are not privileged victims.[191]

b) The attack must take place during a power struggle or within the framework of such a struggle. A strike is not such a struggle.[192]

c) The attack must constitute a serious effort and have a serious chance to accomplish its aim.[193]

d) A common crime only qualifies if its commission directly prepares, facilitates, favors or hides the political offense.[194]

e) The political part must always be predominant.[195]

f) The attack must be effectively connected to the desired change of the political, social, and economic structure. In case of the defense thereof, it must be connected to the maintenance of the structure. The status quo deserves full protection.[196]

g) There must be adequate means applied. Reprehensable and brutal methods disqualify an otherwise privileged offense.[197]

h) There must be no other method available to accomplish the end but the means of violence. Crime is the *ultima ratio*.[198]

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191. *See In re* Belenzow, BG 32 I 531 (1906); *In re* Magaloff-Kresselidze, BG 33 I 169 (1907).

192. *See In re* Vogt, BG 50 I 249 (1924); *In re* Ockert, BG 59 I 136 (1933).

193. *In re* Peruzzo, BG 77 I 50 (1951); *In re* Nappi, BG 78 I 134 (1952).

194. *In re* Koester, BG 19 I 122 (1883); *In re* Magaloff-Kresselidze, BG 33 I 169 (1907).

195. *In re* Nappi, BG 78 I 134 (1952); *In re* Ficorrili, BG 77 I 57 (1951).

196. *In re* Camporini BG 50 I 299 (1924); *In re* Ockert,BG 59 I 136 (1933).

197. Kroeger v. SB, BG 92 I 208 (1966).

198. *In re* Watin, BG 90 I 290 (1964); *In re* Kavic, BG 78 I 139 (1952). The new French law enacted on November 10, 1982 gave the Government, irrespective of treaties

i) The crime must compensate for the potential harm to life, body, and property because the aim protects a higher human interest.[199]

j) A politically inspired offense is not a political offense if it does not meet all the above requirements. But a common crime presented to cover up political prosecution becomes a political offense; likewise, reason to believe that foreign proceedings might prejudice the accused if surrendered makes the alleged crime an "extended political offense." The "extended political offense" is treated like a normal political offense, except for the mandate for prosecution.[200]

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and conventions, the right to extradite murderers, kidnappers and other violent criminals for crimes committed in a nation State with independent justice and democratic principles, and resulting in injury or death. The requesting State must be a community which respects the human rights of its citizens.

The Swiss Supreme Federal Court surrendered an Italian lawyer charged with unlawful arms trafficking and suppression of documents in the Bologne Railroad bombing of August, 1980. In making its decision, the court disregarded political motivation. *In re* Bakker, BG (unpubl.) (Mar. 2, 1983).

199. *In re* Wassilieff, BG 34 I 557 (1908); *In re* Pavan, BG 54 I 215 (1928); *In re* Bodenen, BG (unpubl.) (Aug. 13, 1973) (mercenaries do not qualify).

200. Losembe v. FPM, BG 99 I 547 (1973). In *In re* Buffano, BG 108 I b 408 (1982), the Swiss Federal Supreme Court denied surrender of five alleged Argentine terrorists because of potential human rights violations when extradited. The "extended political crime" principle was accepted, notwithstanding a treaty with Argentina permitting a political offense exception and leaving the determination to the requested country. Argentina-Switzerland Extradition Treaty, *supra* note 26. The Court erred in applying article 3, paragraph 2 of the ECE, and should have applied article 2, paragraph 1, which, however, is in force only as of January, 1983. Bernasconi, *supra* note 101, indicates intervention by the Swiss Court into the entire judicial system of Argentina by asserting that criminal procedure and its application there violates human rights principles and the prerequisites cited, *see id.*, are not met. Mandatory prosecution in Switzerland of Argentine criminals could be made only by accepting the argument that part of the crime (i.e., ransom collection) had been committed in Switzerland, thus establishing jurisdiction. The decision is unique, and it is not known whether it will stand up in the future because of the uncertainty it leaves regarding thoughts on foreign regimes.

The French Law Concerning the Extradition of Foreigners, 1927 J.O. 2068, makes surrender dependent upon:

a) the nature of the legal system in the requested country,

b) the political character of the offense, explicitly exluding sole political motivation or a common offense politically inspired or both,

c) the potential political motivation of the request (not the criminal act), and

d) the risk of an aggravated position for the suspect on account of political opnion, race or religion.

The law is somewhat more specific than that which emanates from the Swiss decision in that an aggravation per se is insufficient; any prosecution aggravates. The defense must also prove the political motive of the request. The fact that the request originates from Argentina for example is not sufficient to deny surrender.

The United States has no comparative judicial decisions on that matter.

CONCLUSIONS

Attempts to find a compromise between the yearning for public security and the compassion for the underprivileged who strive to change our social order have resulted in different interpretations of the law. The international community, thus, has failed in its fight against international crime. Yet, because international public law is a service of civilization, it will capitulate to emotional and irrational behavior. This, of course, applies to all law, but international law demands the abandonment of unlimited sovereignty as a guiding principle. Unfortunately, such a demand is not easy to satisfy with regard to something unknown and subject to emotional and irrational control. That is why even the civilized world has hesitated in giving up what it has today.

This author believes that, notwithstanding the tears and pain and bloodshed that terrorism has caused, it appears on the verge of failure, just as anarchism has failed before. The cause of this optimism is that reason has returned and retaken its place in the thoughts of people.

Anti-terrorist conventions and treaties might be good, but a proper and consistent interpretation of the existing law is more desirable. It is the firm opinion of the author that Swiss judicial decisions

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American decisions have not accepted this defense. In Ziyad Abu Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), Ramsey Clark, arguing for the defense, raised the issue of aggravation. The Seventh Circuit, however, did not rule on this policy determination (i.e., whether there were subsequent disturbances after the alleged criminal threw a bomb, killing two children in Tiberias, Israel). The court assumed that the act was an indiscriminate bombing of the civilian population, and, therefore, did not fall within the political privilege exception. 641 F.2d at 513. The court also refused to determine whether this request by Israel amounted to a subterfuge to punish the offender for his politically motivated crime, leaving such a determination to the State Department. *Id.* In Switzerland, the Swiss Supreme Court decided that question, and might, assuming that the Arab terrorist's position would be aggravated by being prosecuted in Israel, have refused extradition with very uncomfortable consequences to justice, because Switzerland could not have punished the terrorist criminal for lack of jurisdiction.

The Swiss Court recently has held that it is not sufficient to show that a prosecution in a given foreign State might involve certain political groups to which a suspect belongs. *In re* Crepas, BG (unpubl.) (Apr. 17, 1984). *See also In re* della Savia, BG 95 I 468 (1969).

A request for asylum by an allegedly political refugee does not per se result in the denial of extradition for a common crime. The suspect must show that he especially faces a danger of political prosecution if he is extradited. General political events are irrelevant. *See In re* Musa Rifat, BG (unpubl.) (Sept. 5, 1984) (proof of personal situation according to article 3, paragraph 2 of the ECE, *supra* note 4).

have shown such a consistency, while maintaining flexibility in the light of ever-changing circumstances. The concepts of these courts go a long way toward supporting a conservative society-protection approach, made necessary by the steady search for better law enforcement. One cannot overlook, however, the restraint exercised in defense of the accused, especially when confronted with dubious requests. In this way, society's old ideals have not been shelved; no summary proceedings have been established which the courts have recognized, and the writ of habeas corpus, although not known in continental European countries as such, is still highly respected. In summary, the everlasting sense for the independence of law and jurisprudence is kept alive to form the bulwark against political expediency.

APPENDIX

SWISS CASES ON EXTRADITION

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
5-16-1879	V 226	Pistolesi	Italy
9-11-1891	XVII 450	Malatesta	Italy
3-17-1893	19 I 122	Koester	Germany
5-15-1900	26 I 52	Bartoni	Italy
3-30-1901	27 I 52	Jaffei	Italy
4-28-1906	32 I 330	Stephan	Germany
7-18-1906	32 I 538	Belenzow	Russia
2-12-1907	33 I 119	Magaloff	Russia
2-12-1907	33 I 169	Kesseleridze	Russia
5-7-1907	33 I 406	Kilatschitski	Russia
7-13-1908	34 I 573	Wasilieff	Russia
6-21-1912	38 I 148	Silberstein	Russia
9-13-1912	38 I 612	Spitale	Austria
10-24-1912	38 I 617	Stamburger	Austria
6-12-1913	39 I 228	Ouchterlony	Sweden
3-9-1917	43 I 74	Rabat-Limoges	France
10-31-1918	44 I 180	Marcellin	France
3-25-1922	n.p.	Bamberger	Germany
7-14-1923	49 I 266	Ragni	Italy
9-19-1924	50 I 299	Camporini	Italy
11-26-1924	50 I 249	Vogt	Germany
10-1-1927	53 I 319	DeCock	Belgium
6-15-1928	54 I 215	Pavan	France
11-23-1928	54 I 338	Noblot	Germany
10-17-1930	56 I 457	Kaphengst	Germany
6-3-1931	57 I 15	Herren	Belgium
12-4-1931	57 I 184	Buzzi (I)	Italy
10-20-1933	59 I 135	Ockert	Germany
6-22-1934	60 I 216	Grandi	Italy
9-9-1943	n.p.	Dieckmann	France
1-24-1951	77 I 50	Peruzzo	Italy
2-14-1951	77 I 57	Ficorilli	Italy
6-21-1950	76 I 130	Hoter	Germany
1-23-1952	78 I 134	Nappi	Italy
4-30-1952	78 I 39	Kavic	Yugoslavia
9-24-1952	78 I 235	Wyrobnik	Germany
3-4-1953	79 I 34	Redjoff	Belgium

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
10-27-1955	81 IV 285	Buser	Basle-City
12-16-1955	81 I 385	Grass/ Graffenried	Belgium/Police Dept. (Fed.)
11-21-1956	82 I 167	Hauri	France
5-17-1961	87 I 134	Ktir	France
6-29-1961	87 I 195	Lazzeri	Italy
12-5-1961	87 IV 59	Kuhn	Germany
7-4-1962	88 I 93	Ehemann	Germany
7-4-1962	n.p.	Gaessler	Germany
6-6-1962	88 I 37	Hornig	Germany
3-20-1963	89 I 200	Zahabian	Iran
6-18-1964	90 IV 123	Glaser	Germany
10-7-1964	90 I 298	Watin	France
5-12-1965	91 I 127	Gilette	France
5-11-1966	92 I 108	Kroeger	Germany
6-8-1966	92 I 285	Nesti	Italy
9-28-1966	92 I 382	Teszler	Austria
12-12-1967	93 II 197	Hachette	France
11-26-1969	95 I 462	della Savia	Italy
2-11-1971	97 IV 160	Leuzinger	Zurich
6-2-1971	97 Ib 372	Grosby	United States
2-2-1972	98 I a 122	Leyrer	Germany
7-11-1973	99 Ia 547	Losembe	Zaire
8-13-1973	n.p.	Bodenan	Spain
9-18-1974	100 I a 410	Thareau	France
3-19-1975	101 I a 60	Castori	Italy
6-4-1975	101 I a 402	Tani	Italy
7-9-1975	101 I a 410	Mifsud	Great Britain
7-30-1975	101 I a 416	Bartolini	Italy
8-7-1975	101 IV 57	A.v. St. Gall	Germany
8-26-1975	n.p.	Schiaro	Italy
9-21-1975	101 I b 289	Mitchell	South Africa
11-7-1975	n.p.	Bartolai	Italy
12-3-1975	n.p.	Becker	Germany
12-12-1975	101 I a 592	Fiorini	Italy
12-12-1975	101 I a 533	Lynas	United States
12-12-75	101 I a 602	Morlacchi	Italy
12-17-1975	101 I a 610	Schlegel	Germany
3-29-1976	n.p.	Monserrate	Spain
6-15-1976	n.p.	Loeser	Germany
6-30-1976	n.p.	Umschaden	Austria

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
7-14-1976	n.p.	Jocic	Yugoslavia
7-14-1976	102 I a 317	Lanusse	France
12-1-1976	n.p.	Furet	Italy
12-1-1976	n.p.	Jimeno	Spain
1-12-1976	n.p.	Bohrer	Germany
1-3-1977	103 I b 20	Fedele	Italy
1-26-1977	n.p.	Dameni	Italy
1-26-1977	103 I a 218	Cicchelero	Italy
1-26-1977	n.p.	Szvezsenyi	Italy
2-23-1977	103 I a 326	Leoment	France
3-23-1977	n.p.	Silvestri	Italy
5-11-1977	n.p.	Halbleib	Germany
5-25-1977	103 I a 206	Sternberg	Germany
6-22-1977	n.p.	Rabinovic	Germany
5-8-1977	n.p.	Krause	Italy
9-21-1977	n.p.	Troltsch	United States
10-3-1977	n.p.	Letnikovski	Luxembourg
10-19-1977	n.p.	Cerovic	Yugoslavia
11-16-1977	n.p.	Wirth	Germany
11-16-1977	n.p	Grabovsky	Germany
11-30-1977	103 Ia 616	Veraldi	France
11-30-1977	n.p.	Panovski	Luxembourg
12-21-1977	103 I a 624	Donadoni	Italy/Belgium
12-21-1977	n.p.	Connell	United States
1-25-1978	104 I a 49	Cloppenburg	Germany
4-12-1978	n.p.	Gratt	Austria
4-14-1978	104 IV 77	Lenzlinger	Austria
4-26-1978	n.p.	Olivi	Italy
7-6-1978	n.p.	Kramarsic	Yugoslavia
7-5-1978	n.p.	Anzulovic	Yugoslavia
9-1-1978	n.p.	Fosset	Belgium
10-4-1978	n.p.	Mouali	United States
2-1-1979	105 IV 82	Halbleib	Germany
2-23-1979	n.p.	Haufe	Germany
6-4-1979	n.p./rev.	Anzulovic	Yugoslavia
5-18-1979	n.p.	Bonelli	Italy
8-8-1979	105 I b 282	Kroecher	Germany
9-21-1979	105 I b 286	Mitchell	South Africa
9-21-1979	n.p.	Sarda	France
9-21-1979	n.p.	Heidt	Germany
9-28-1979	105 I b 418	Raytheon	United States
10-12-1979	n.p.	Bruno	Germany

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
12-21-1979	105 I b 294	Koenig	Germany
12-21-1979	n.p.	Tettero	Italy
1-15-1980	106 I b 16	Bozano	Italy/Geneva
1-25-1980	n.p.	Roviera	Germany/Italy
2-22-1980	n.p.	Khetty	United Arab Emirates
2-29-1980	n.p.	Gruenig	Germany
2-29-1980	n.p.	Gropelli	Italy
4-25-1980	n.p.	Kloth	Germany
4-25-1980	106 I b 371	Soares	Portugal
5-9-1980	n.p.	Grunwald	Germany
6-6-1980	n.p.	Bernats	Germany
6-13-1980	106 I b 409	Bozano	Italy
7-11-1980	n.p.	Makris	Germany
11-7-1980	106 I b 297	Jaroudi	France
1-28-1980	106 IV 39	B.v. Grisons	Austria
9-26-1980	106 I b 260	Schlumpf	France
10-3-1980	106 I b 307	Wagner	Germany
7-31-1980	n.p.	Chouiter	Italy
10-2-1980	n.p.	Senni	France
12-12-1980	n.p.	Ble	France
3-27-1981	107 I b 68	Dharmarajah	Sri Lanka
3-27-1981	107 I b 74	Weisskirchen	Germany
6-9-1981	107 I b 78	Schmidt	Germany
6-25-1981	107 I b 80	Chatelain	France
9-14-1981	107 I b 261	Prioil-Capelini	Germany
10-9-1981	107 I b 264	Couchie	Geneva
12-15-1981	107 I b 274	Miller	United States
12-22-1981	n.p.	Bartolai	Italy
10-6-1981	n.p.	Carron	Germany
11-13-1981	n.p.	Pellejero	Spain
12-7-1981	n.p.	Moeller	Germany
3-24-1982	n.p.	Wensierski	Germany
5-26-1982	n.p.	Frommelt	Germany
6-23-1982	n.p.	Gilles	Germany
6-30-1982	n.p.	Kroecher	Germany
8-3-1982	108 I b 525	Suarez	United States
8-3-1982	108 I b 296	Bohm	Germany/ Austria
9-17-1982	n.p.	Tomasello	Italy
10-13-1982	108 I b 301	Bagci	Tunesia

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
10-27-1982	n.p.	Wiemers	Germany
11-3-1982	108 I b 408	Bufano	Argentina
1-26-1983	109 I b 47	Santa Fe	United States
2-3-1983	109 I b 60	Federici	Italy
3-2-1983	n.p.	Bakker	Netherlands
2-15-1983	109 I b 58	Ciolini	Italy
3-2-1983	109 I b 165	Maurel	France
3-2-1983	109 I b 64	Sener	Tunesia
3-22-1983	n.p.	Oezdemir	Tunesia
4-8-1983	n.p.	Zunac	Austria
4-20-1983	n.p.	Krutschnitt	Germanny
4-27-1983	109 I b 174	Zahn	Germany
5-4-1983	109 I b 158	Panamex	United States
6-23-1983	109 I b 223	Gelli	Italy
6-7-1983	n.p.	Najohn	United States
7-12-1983	n.p.	Peter	Germany
7-13-1983	109 IV 159	Baskaya	Tunesia
7-14-1983	n.p.	Kazimir	Germany
8-11-1983	n.p.	Basten	Germany
8-12-1983	n.p.	Hayes	Australia
8-19-1983	n.p.	Daguzan	France
8-19-1983	109 I b 317	Gelli	Italy
8-29-1983	n.p.	Carboni	Italy
9-28-1983	n.p.	Bener	Italy
12-22-1983	109 IV 174	Sifoni	Spain
10-12-83	n.p.	Norling	United States
12-10-1983	n.p.	Kladivko	Austria
10-21-1983	n.p.	Pinna	Belgium
10-24-1983	n.p.	Steinert	Germany
12-1-1983	n.p.	Hooning	Netherlands
12-1-1983	109 I b 339	Marsman	Netherlands
1-11-1984	n.p.	Gutzwiler	Germany
2-8-1984	n.p.	Banqie Scandin.	Sweden
1-16-1984	n.p.	Muchow	Germany
2-8-1984	n.p.	Fioroni - rev.	Italy
2-8-1984	110 I b 82	McVey	United States
2-5-1984	110 I b 88	Garcia Martinez	United States
3-4-1984	n.p.	Calmasini	Italy
3-7-1984	n.p.	Management Serv.	United States

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
7-7-1984	n.p.	Banque Depots	Italy
3-21-1984	n.p.	Ursino	Italy
3-24-1984	n.p.	Chebbah	Tunesia
3-28-1984	110 I b 185	Nelson	United States
4-4-1984	110 I b 187	Marsman	Netherlands
6-19-1984	n.p.	Bonascossa	Italy
5-11-1984	n.p.	Kruell	Germany
7-4-1984	110 I b 173	Chavarria Garcia	Mexico
8-6-1984	n.p.	Torasso	Italy
9-18-1984	n.p.	Amoretti	Italy
9-5-1984	n.p.	Musa Rifat	Yugoslavia
8-6-1984	110 IV 118	Palazzolo	Italy
9-5-1984	n.p.	Keyser-Ullman	France
9-12-1984	n.p.	Lindauer	Germany
9-18-1984	n.p.	Accampora-Megrelli	Italy
10-31-1984	n.p.	Steinhauslin	Italy
10-31-1984	110 I b 280	McCharra	Ireland
10-3-1984	n.p.	Chamakhi	Tunesia
11-7-1984	n.p.	Schulte	Germany
11-8-1984	n.p.	Heckenburger	Austria
11-28-1984	n.p.	Geiger Bechter	Austria
10-14-1984	n.p.	Scharbach	Germany
10-18-1984	n.p.	Sadik Sahit	Belgium
10-3-1984	n.p.	Chamakh Toufik	Tunesia
10-31-1984	n.p.	Grenade	France
11-15-1984	n.p.	Pasca	Italy
2-22-1984	n.p.	Ullah	Germany
3-6-1984	n.p.	Groetzner	Germany
3-7-1984	n.p.	I I C Management	Belgium
4-17-1984	n.p.	Crepas	Italy
6-13-1984	n.p.	Tikal	Austria
9-15-1984	n.p.	Klingenbrunner	Germany
10-24-1984	n.p.	Meyro	United States
11-13-1984	n.p.	Cardaropoli	Austria

Date (M-D-Y):	*BG:*	*In re:*	*State req.:*
11-26-1984	n.p.	Beck	Italy
12-2-1984	n.p.	G.D. Services Inc.	United States
1-15-1985	n.p.	Salah Abdallah	Italy
2-18-1985	n.p.	Paul Haywood	United States
2-18-1985	n.p.	Montez-Martinez	Spain
2-25-1985	n.p.	Boccardi	Italy
2-20-1985	n.p.	Gelbard	Argentina
3-13-1985	n.p.	Bottone	Italy
3-26-1985	n.p.	Carboni	Italy
3-10-1985	111 I b 52	Bogdanovic	Yugoslavia
3-12-1985	n.p.	GBD Services	Italy
6-5-1985	n.p.	Tirnovali	Germany
6-14-1985	n.p.	Boccardi	Italy
5-15-1985	n.p.	Oenzel	Germany
9-23-1985	n.p.	Klumper	Germany
9-17-1985	n.p.	Malafronte	Italy
5-15-1985	n.p.	Tradati	Italy
7-12-1985	n.p.	Fodor	Italy
8-30-1985	n.p.	Colmegna	Italy
8-30-1985	n.p.	Just-Flossel	Italy
9-17-1985	n.p.	Senatore	Italy
9-25-1985	n.p.	van Couvenberghe	United States
10-3-1985	n.p.	Chiaramonte/ Rapaport	United States
10-15-1985	n.p.	Cuevas-Capeda	United States
10-11-1985	n.p.	Yasar-Lisacik	Italy
10-22-1985	n.p.	De Carli	Italy
10-17-1985	n.p.	Riggio	Italy
10-9-1985	n.p.	Sufi	Germany
10-28-1985	n.p.	Timpf	Germany
11-18-1985	n.p.	Ibralic	Germany
11-26-1985	n.p.	Crepas	Italy
12-3-1985	n.p.	Collu	Italy
1-9-1986	n.p.	Chiabotti	Italy
1-28-1986	n.p.	Guersel	Italy
11-27-1985	A 317/85	Interclean/ Ziegler	Germany

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